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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 662. 247.

F. S. BOWKER, MANAGING OWNER OF SCHOONER "WILLIAM H. DAVENPORT," APPELLANT,

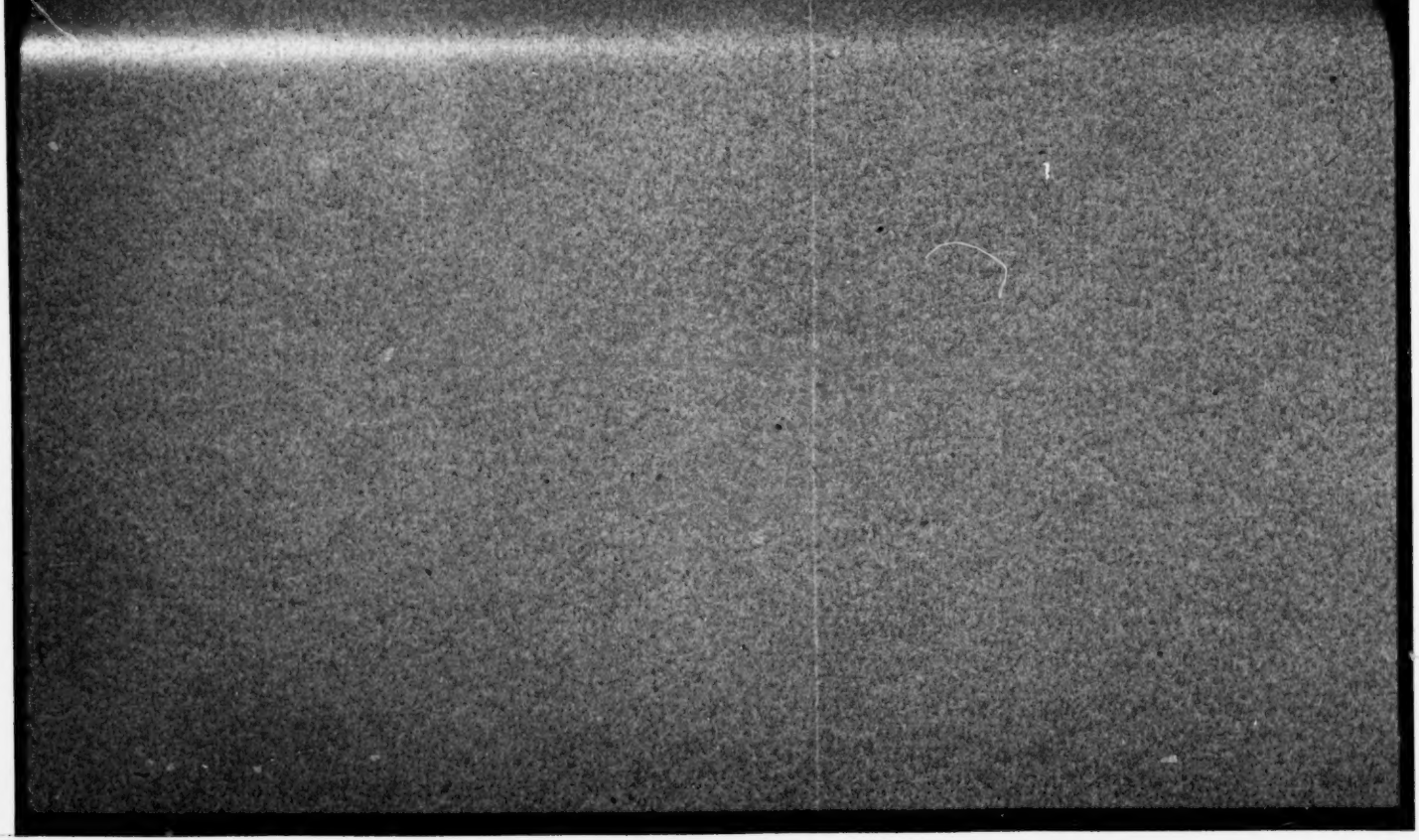
vs.

THE UNITED STATES, OWNER OF THE LIGHT-HOUSE TENDER "AZALEA."

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED FEBRUARY 6, 1901.

(18,047.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1901.

1 United States District Court, District of New Jersey.

F. S. BOWKER, Managing Owner of the Schooner William H. Davenport, Libelant, Appellant,
against
THE UNITED STATES OF AMERICA, Owner of the Light-house Tender Azalea, Appellee.
} Cross-libel.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I hereby certify the questions of jurisdiction involved in this appeal, and the circumstances under which such questions have arisen for decision in this court, as follows:

1. On November 3rd, 1899, the United States of America, by J. Kearny Rice, attorney for the district of New Jersey, filed a libel in this court against the schooner William H. Davenport, her tackle, apparel, and furniture, and against all persons intervening therein, in a cause of collision, civil and maritime, seeking to recover the sum of $5,000 damages, alleged to have been sustained by the light-house tender Azalea in a collision with the said schooner on October 2nd, 1899, off Cornfield Point light-ship, in Long Island sound. It was averred in the libel that the collision was in no way caused by the fault or negligence of those on board the light-house tender Azalea, but that it was solely due to the carelessness and negligence of those in charge of the schooner William H. Davenport in certain particulars stated. The libel further recited that its premises
2 were true and were within the admiralty and maritime jurisdiction of this court, and it concluded with the formal prayer "that process in due form of law and according to the practice of this court may issue against the said schooner William H. Davenport, her tackle, apparel, and furniture, and that all persons interested therein may be cited to appear and answer on oath the matters aforesaid, and that the schooner William H. Davenport may be condemned and sold to pay libelant's claim, with interest and costs, and that the court will otherwise right and justice administer in the premises."

The libel was signed by J. Kearny Rice, the then United States attorney for the district of New Jersey. A copy of the said libel is hereto attached and made a part hereof.

2. Process in due form was issued against the said schooner William H. Davenport according to the prayer of the libel, and afterwards, to wit, on November 8th, 1899, the marshal of this district filed his return of said process, certifying that on November 4th, 1899, he had made due attachment of the said schooner pursuant to the direction contained in the writ issued to him, and that said vessel was then in his custody.

3. On November 22nd, 1899, F. S. Bowker, managing owner of said schooner, by Charles H. Potter, his agent, filed in this court a claim to said schooner on behalf of the owners thereof, and on the

same day he filed a stipulation for costs in the sum of $250, and a stipulation for value in the sum of $5,000, conditioned to abide the decree of the court, with approved surety; and thereupon, by order of the court, the schooner was released from the custody of
3 the marshal under the process of this court, and was restored to the possession of her said owners.

Copies of the claim, the stipulation for costs, and the stipulation for value are hereto attached and made a part hereof.

4. On December 11th, 1899, the said claimant, F. S. Bowker, filed his answer to the said libel in this court, denying that the collision mentioned in the libel was caused or contributed to by those in charge of the schooner, and alleging that the said collision and the damage resulting therefrom were caused wholly by the fault of the said steamer Azalea and of those in charge of her, in certain particulars which were stated. The answer concluded with a prayer that the libel be dismissed with costs. A copy of the said answer is hereto attached and made a part hereof.

5. On December 29th, 1899, the said F. S. Bowker, for and in behalf of himself and his co-owners, filed a cross-libel in this court against the United States seeking to recover the sum of $6,000 damages alleged to have been sustained by the schooner William H. Davenport and by her cargo in the collision hereinbefore referred to. It was alleged in the cross-libel that the collision was wholly due to the negligence and fault of the said steamship Azalea and of those in charge of her, in certain respects which were particularly set forth. The prayer of the said cross-libel asked "that a citation according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the
4 damages with interest and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner Wm. H. Davenport by the filing of a libel against said schooner on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross-libel, and that this honorable court will give to the cross-libelant such other and further relief as in law and justice he may be entitled to receive, this said action being a counter-claim arising from the same cause of action for which the original libel was filed against the said Wm. H. Davenport." A copy of the said cross-libel is hereto attached and made a part hereof.

6. Pursuant to the prayer of the said cross-libel, a citation was issued out of this court on December 29th, 1899, and was served on J. Kearny Rice, then United States attorney for this district, who was the proctor of record for the libelant in the original libel. A copy of the said citation is hereto attached and made a part hereof.

7. The United States attorney on February 14th, 1900, filed the following notice of motion entitled in the original cause, viz: "Notice

is hereby given that I shall move before said court to quash the citation served upon me as United States attorney in this cause upon the ground that no citation can issue against the United States in this matter, and also that the service of the citation upon me as United States attorney for the district of New Jersey is without warrant of law." A copy of said notice is hereto attached and made a part hereof.

5 8. This motion came regularly before the court for hearing and was argued by counsel, and on December 17th, 1900, I filed a written decision holding that the said cross-libel could not be maintained, because the court had no jurisdiction to entertain the cause or to enter a decree as prayed for against the United States, as will more fully appear from the copy of said decision which is hereto attached and made a part hereof. By a final decree entered herein December 17th, 1900, it was by the court adjudged that the said citation be quashed, and that the said cross-libel be dismissed with costs. A copy of the said final decree is also hereto attached and made a part hereof.

9. On January 11th, 1901, an appeal by the said cross-libelant to the Supreme Court of the United States was duly allowed by me on the questions of jurisdiction argued before me in the district court and specified in the assignment of errors filed herein, and pursuant to the statutes and rules of court touching such appeals the said questions are now, to wit, this 11th day of January, 1901, and in the same term at which the said final decree was entered, certified to the Supreme Court, viz:

(1.) Did the United States, by coming into this court and filing and maintaining a libel as owner of the Azalea against the schooner William H. Davenport, as above stated, submit itself to the jurisdiction of the court and to the ordinary rules and practice in admiralty causes, so as to authorize the court to entertain a cross-libel by the owner of the schooner against the United States, of which notice was given to the United States attorney, as stated, and to enter an affirmative decree against the United States thereunder, as prayed

6 in said cross-libel, if the findings of fact should warrant such a decree?

(2.) Did the service of the citation issued under the cross-libel, by delivery thereof to the United States attorney, the proctor of record for the libelant in the original libel, give this court jurisdiction over the United States under the cross-libel?

(3.) Was the United States, as the original libelant, bound, under the provisions of the 53rd rule in admiralty, to appear and submit itself to the jurisdiction of the court under the cross-libel, after service of process thereunder on its proctor of record in the original suit; and in default of such appearance, had the court power to stay proceedings under the original libel?

(4.) Did this court, on the facts above stated, have jurisdiction of the cross-libel and of the United States thereunder?

(5.) Could the cross-libel, on the facts above stated, be maintained in this court against the United States?

Wherefore the foregoing questions are respectfully certified to the Supreme Court of the United States for its decision.

January 11, 1901.

ANDREW KIRKPATRICK,
United States District Judge for the District of New Jersey.

7 To the Honorable Andrew Kirkpatrick, judge of the district court of the United States for the district of New Jersey:

The libel and complaint of the United States of America, as owners of the light-house tender Azalea, at the times hereinafter mentioned, against the three-masted schooner William H. Davenport, her tackle, apparel, and furniture, and against all persons intervening for their interest therein, in a cause of collision, civil and maritime, alleges as follows:

First. That the libelants are and were, at the time of the collision herein described, the owners of the said light-house tender Azalea, and that the three-masted schooner William H. Davenport is now within the jurisdiction of this honorable court.

Second. That on the 2nd day of October, A. D. 1899, at about twelve o'clock m., the said light-house tender Azalea left the port of New York bound for the port of New Bedford.

And libelants further allege on information and belief that after leaving the harbor the light-house tender Azalea took a course which carried her near to and past the Cornfield Light vessel, so called, a course of about east one-half north, which course she held up to the time of the collision hereinafter mentioned. Said light-house tender Azalea was well and properly manned with competent master, officers, and crew, and her lights were properly set at sundown, and continued to burn brightly. The night was clear and a good one for seeing lights, and the wind blew N. N. E., a moderate breeze.

8 Third. At about 10.20 o'clock p. m. the lights of the schooner which afterward proved to be the schooner William H. Davenport aforesaid were observed about one-half point on said light-house tender's port bow, about two miles off. The helm of the light-house tender Azalea was ported and kept off one point, losing the schooner's green light and bringing her red light about one and one-half points on the port bow of the said light-house tender Azalea, and the lights continued the same as the vessels approached.

The said Azalea was not more than one hundred yards distant from the said schooner William H. Davenport, when the said schooner's green light came suddenly in sight, almost ahead. Immediately the helm of the said light-house tender Azalea was placed hard-a-starboard, and at the same time the engines of the said light-house tender Azalea were stopped and reversed, and immediately afterwards the two vessels came into collision. The said light-house tender Azalea was struck by said schooner William H. Davenport amidships and abreast of the main rigging.

Fourth. By means of said collision the stem above the water line upon the said light-house tender Azalea and three feet below the top rail was broken and bent direct to starboard and aft about four feet, the side bow plates being bent at right angles and back to the

collision bulkhead, and the hawse pipes were driven up inboard about fifteen inches.

Fifth. The said collision was in no way caused by the fault or negligence of those on board of the light-house tender Azalea, but was solely due to the carelessness and negligence of those in charge
9 of the schooner William H. Davenport aforesaid, in that (1) the said schooner William H. Davenport did not hold her course, but seeing the red light of the light-house tender aforesaid, and running free, within a short distance of the said light-house tender Azalea, the helm of the said schooner William H. Davenport was placed hard-a-starboard and ran directly across the track of the said Azalea, and in other respects, which will be shown on the trial of this suit.

Sixth. By reason of the said collision the said United States of America have suffered damages to its light-house tender to the amount of five thousand dollars.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court. Wherefore the libelants pray that the process in due form of law and according to the practice of this court may issue against the said schooner William H. Davenport, her tackle, apparel, and furniture, and that all persons interested therein may be cited to appear and answer on oath the matters aforesaid, and that the said schooner William H. Davenport may be condemned and sold to pay libelant's claim, with interest and costs, and that the court will otherwise right and justice administer in the premises.

J. KEARNY RICE,
U. S. Attorney, District of New Jersey.

10 [Endorsed:] United States district court, district of New Jersey. U. S. *v.* Schooner Wm. H. Davenport, her tackle, apparel, etc. (Copy.) Libel for collision. J. Kearny Rice, U. S. att'y. Filed Nov. 3, 1899, at 9 o'clock a. m. George T. Cranmer, clerk.

11 District Court of the United States for the District of New Jersey.

THE UNITED STATES OF AMERICA
vs.
THE SCHOONER WILLIAM H. DAVENPORT.

And now Chadwick & Potter, intervening as agents in the port of New York for the interest of Frank S. Bowker and others in the said schooner, appears before the honorable court and makes claim to the said schooner, &c., as the same are attached by the marshal under process of this court, at the instance of the United States, and the said Chadwick and Potter aver that they were in possession of the said schooner at the time of the attachment thereof, and that the persons above named are the true and *bona fide* owners of the said schooner, and that no other person is the owner thereof, and the said

claimants are true and lawful bailees thereof as agents. Wherefore they pray to defend accordingly.

CHADWICK & POTTER,
By CHAS. H. POTTER.

CONVERS & KIRLIN,
Proctor- for Claimant-.

12 SOUTHERN DISTRICT OF NEW YORK, ss.

Charles H. Potter, being duly sworn, deposes and says that he resides 429 Fifth street, Brooklyn; that he is the junior member of the firm of Chadwick and Potter above named; that the owners of said schooner reside in Phippsburg, Maine, and that this deponent is duly authorized to put in this claim in behalf of the owners of the said schooner, and that the said claim is true of the knowledge of this deponent, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

CHAS. H. POTTER.

Sworn to and subscribed this 8th day of November, A. D. 1899, before me—

JAMES T. KILBRETH,
[L. S.] *Notary Public, New York County.*

13 [Endorsed:] United States district court, district of New Jersey. Chadwick & Potter, claimants of the schr. William H. Davenport, *asm.* The United States of America. (Copy.) Claim of agent. Convers & Kirlin, proctors for claimant-. Filed Nov. 22, 1899, at 9.30 o'clock a. m. George T. Cranmer, clerk.

14 District Court of the United States for the District of New Jersey.

Filed and recorded the — day of ——, —.

Stipulation for Claimants' or Respondents' Costs, Entered into Pursuant to the Rules and Practice of This Court.

Whereas a libel was filed in this court on the third day of November, 1899, by the United States against the schooner "William H. Davenport" for the reason and causes in the said libel mentioned; and

Whereas a claim to the said vessel has been filed by Chadwick & Potter, and the parties hereto hereby consenting that, in case of default or contumacy on the part of the claimants or their surety, execution for the sum of two hundred and fifty ($250.00) dollars may issue against their goods, chattels, and lands:

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the claimants herein and the stipulator undersigned, American Surety Company of New York, of 100 Broadway, in the city of New York, and by occupation a surety company, shall be, and it is hereby, bound in the sum of two hun-

dred and fifty dollars, conditioned that the claimants above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court or upon appeal by
15 the appellate court.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*
CORTLANDT VAN RENSSELAER,
Attorney.

67156.

Taken and acknowledged this 20th day of November, 1899, before me—

[L. S.]

K. J. PEIRCEY,
Notary Public, Kings Co.

[5c. internal-revenue stamp.]

SOUTHERN DISTRICT OF NEW YORK, *ss:*

David B. Sickels, vice-president of American Surety Company of New York, the above stipulator, being duly sworn, deposes and says that said company is a domestic corporation of the State of New York and is worth the sum of five hundred ($500) dollars over and above all its debts and liabilities.

DAVID B. SICKELS.

Sworn to before me this 20th day of November, 1899.

[L. S.]

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland, and Nassau Cos.

16 [Endorsed:] United States district court, district of New Jersey. The United States *v.* The Schooner William H. Davenport. (Copy.) Stip. for claimants' costs. Filed Nov. 22, 1899, at 9.30 o'clock a. m. George T. Cranmer, clerk.

17 District Court of the United States for the District of New Jersey.

Filed and recorded the — day of ——, —.

Stipulation for Value, Entered into Pursuant to the Rules and Practice of This Court.

Whereas a libel was filed on the third day of November, 1899, by the United States against the schooner "William H. Davenport" for the reason and causes in the said libel mentioned; and

Whereas claimant of said vessel has filed due claim thereto, and also stipulations for costs and value, the latter in the sum of five thousand ($5,000) dollars, the agreed value thereof, as appears from the

stipulation at the foot hereof, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant- or their surety execution for the above-agreed amount, with interest thereon from this date, may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such that if the claimant- herein and American Surety Company of New York, of 100 Broadway, in the city of New York, and by occupation a surety company, the stipulator undersigned, shall abide by all orders of the court, interlocutory or final, and pay the amount awarded by
18 the final decree rendered by this court or by any appellate court if an appeal intervene, with interest, then this stipulation to be void; otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK,
[L. S.] By DAVID B. SICKELS, *Vice-President.*
CORTLANDT VAN RENSSELAER,
Attorney.

67155.

Taken and acknowledged this 20th day of November, 1899, before me—

K. J. PIERCEY,
Notary Public, Kings Co.

[Ten-c. internal-revenue stamp.]
[Two-c. internal-revenue stamp.]
[One half-c. internal-revenue stamp.]

19 SOUTHERN DISTRICT OF NEW YORK, *ss:*

David B. Sickels, vice-president of American Surety Company of New York, the above stipulator, being duly sworn, deposes and says that said company is a domestic corporation of the State of New York, and is worth the sum of ten thousand dollars over and above all its debts and liabilities.

DAVID B. SICKELS.

Sworn to before me this 20th day of November, 1899.

J. K. PEIRCEY,
[L. S.] *Notary Public, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland, and Nassau Cos.

20 [Endorsed:] United States district court, district of New Jersey. The United States *v.* The Schooner William H. Davenport. (Copy.) Stipulation for value. Filed Nov. 22d, 1899, at 9.30 o'clock a. m. George T. Cranmer, clerk.

21 District Court of the United States, District of New Jersey.
In Admiralty.

To the Honorable Andrew Kirkpatrick, judge of the district court of the United States within and for the district of New Jersey:

The answer of F. S. Bowker, of Phippsburg, district of Maine, managing owner of the schooner "William H. Davenport," to the libel of the United States of America, owner of the steamer known as the light-house tender "Azalea," in a cause of collision; and thereupon the said claimant answers and alleges as follows:

First. That as to the matters contained in the first article of said libel, your respondent admits the same to be true.

Second. That as to the matter contained in the second article of said libel, your respondent denies that the wind was north-northeast. He admits that the night was clear and a good one for seeing lights, but as to the other matters therein contained he is ignorant, and so he can neither admit nor deny the same, but leaves the libellant to its proof if material.

Third. That as to the matters and allegations contained in the third article of said libel, the same are, as a whole, so untruly stated that your respondent denies the truth of the same as though each allegation were expressly denied, excepting so much as may be hereinafter admitted.

Fourth. That as to the matter and allegations contained in
22 the fourth article of said libel your respondent is ignorant, and therefore unable to admit or deny the same, but leaves the libellant to its proof if material.

Fifth. Your respondent denies the allegations contained in the fifth and sixth articles of said libel, except the jurisdiction of this honorable court, which it admits.

Sixth. And your respondent, further answering, says that on October 2, 1899, a collision took place between the schooner "William H. Davenport" and the steamer "Azalea," a light-house tender. The true facts relating to said collision are as follows:

On October 2, 1899, the schooner "William H. Davenport" was on a voyage from South Gardner, Maine, to New York with a cargo of lumber. At sundown her side lights were lighted and put in their proper places and continued properly set and brightly burning until the collision hereinafter described.

At 8 p. m. the port watch came on deck, the wind at the time being about northwest by north. At 10 p. m. the man at the wheel and the lookout were changed on board of said schooner, and each position was filled by another competent man. The course of the schooner at that time was west by south, the schooner being on the starboard tack close hauled by the wind. Soon after 10 p. m. the mast-head light of a steamer (which afterwards proved to be the steamer "Azalea") was seen by those on the schooner on her starboard or weather bow. Not long after both of the steamer's side lights came in view more on the weather or starboard bow of the schooner "William H. Davenport." Soon after the said steamer shut in her green side light and showed only her red, and without

other change came on at a high rate of speed, striking said
23 schooner "William H. Davenport," which all of the time held her course, on her starboard side between the fore and main rigging, cutting well into her hull and causing her to fill with water.

Seventh. That after the said collision the said schooner "William H. Davenport" was in need of assistance and the said steamer "Azalea" did not lay by the said schooner "William H. Davenport" or give her name, although requested by those on board of her so to do, and although the same could have been done without serious danger to the "Azalea."

That by an act of Congress passed in 1890, by reason of the failure so to do, the said steamer "Azalea" shall be held in fault for said collision in the absence of clear proof to the contrary.

Eighth. That the said collision and the damage resulting therefrom was caused wholly by the fault of the said steamer "Azalea" and those in charge of her in not keeping clear of a vessel under sail: that the said schooner "William H. Davenport" held her course and was wholly without fault, and those on board of her did all that could have been done to avoid a collision.

Ninth. That all and singular the premises are true and with the admiralty and maritime jurisdiction of this honorable court.

Wherefore your respondent prays that the aforesaid libel may be dismissed with costs.

CONVERS & KIRLIN,
CARVER & BLODGETT,
Proctors for Respondent.

24 STATE AND CITY OF NEW YORK, } ss:
Southern District of New York, }

Charles H. Potter, being duly sworn, deposes and says that he is a member of the firm of Chadwick & Potter, agents in the port of New York for F. S. Bowker, of Phippsburg, Maine, managing owner of the schooner William H. Davenport; that he has read the foregoing answer and believes it to be true. The sources of his information and the grounds of his belief are statements made to deponent by the master and officers of the schooner William H. Davenport. The reason this verification is not made by the said F. S. Bowker is that he is a resident of the district of Maine, and is not within one hundred miles of the district of New Jersey or the southern district of New York.

CHAS. H. POTTER.

Sworn to before me this 8th day of December, 1899.
[SEAL.] JAMES T. KILBRETH,
Notary Public, New York County.

25 [Endorsed:] United States district court. United States of America against Schooner William H. Davenport. (Copy.) Answer. Convers & Kirlin, Carver & Blodgett, proctors for respondent, 5 Beekman St., New York, N. Y. Filed Dec. 11th, 1899, at 9 o'clock a. m. George T. Cranmer, clerk.

26 District Court of the United States, District of New Jersey.
In Admiralty.

To the Honorable Andrew Kirkpatrick, judge of the district court of the United States within and for the district of New Jersey:

F. S. Bowker, of Phippsburg, district of Maine, managing owner of the schooner "William H. Davenport," for and in behalf of himself and the other owners of said schooner and for and in behalf of the owner of the cargo of lumber late on board of said schooner, exhibits this his cross-libel and complaint against the United States of America, owner of the steamer known as the light-house tender "Azalea," in a cause of collision, this action being a cross-libel brought under the admiralty rule 53 of the Supreme Court of the United States, being a counter-claim arising out of the same cause of action as the suit brought by the United States against the said schooner "William H. Davenport," in a cause of collision by a libel filed November 3, 1899, in said court, and thereupon the said cross-libellant doth allege and articulately propound as follows, viz:

First. That the said schooner "William H. Davenport," owned by your cross-libellant and others, was and is a three-masted schooner; that on September 25, 1899, the said schooner, loaded with a cargo of lumber, left the port of South Gardner, Maine, bound for New York; that the said vessel was then stout, staunch, and strong, well manned and equipped, and so continued until after the collision hereinafter described.

Second. That on October 2nd (the said schooner then
27 being near the entrance to Long Island sound), at sundown, her side lights were lit, placed in their proper positions, and continued lighted and brightly burning until after the facts hereinafter narrated; that at eight p. m. the port watch came on deck, the wind at the time being about northwest by north and baffling and the weather clear, the said schooner being then on the starboard tack. A competent man was placed at the helm and another competent seaman on the lookout. At 10 p. m. the lookout and the helmsman were relieved, competent seamen going to each position. At this time the wind was from northwest by north to northwest, somewhat baffling, the night clear, and the vessel heading her course west by south, the schooner still being on the starboard tack. Soon after ten p. m. the mast-head light of a steamer (which afterwards proved to be the steamer "Azalea") was sighted and reported by those on board of the schooner "William H. Davenport," bearing on her starboard or weather bow. Not long after, the side lights of said steamer were seen, but more on the weather bow of the schooner. Soon after, the said steamer shut in her green light and showed only her red light, and, without change, came on at a high rate of speed, striking the said schooner "William H. Davenport" on the starboard side between the fore and the main rigging, cutting well into the schooner's hull and causing her to fill with water, but, by reason of her being loaded with lumber, said schooner did not sink. During all of this time the said schooner held her course.

Third. That the said collision took place at or near 10.30 p. m.,

about one mile from Cornfield Point light-ship. The said
28 schooner had all sail set, was on the starboard tack, and was making about seven miles per hour. The tide was setting to the eastward about one and one-half (1½) knots; the night was clear and the wind from northwest by north to north northwest.

Fourth. That the said steamer "Azalea" did not lay by the said schooner "William H. Davenport" or give her name, although requested by those on board of her so to do, and although the same could have been done without serious danger to the "Azalea;" that by an act of Congress passed in 1890 by reason of the failure so to do the said steamer "Azalea" shall be held in fault for said collision in the absence of clear proof to the contrary.

Fifth. That the said collision and the damage resulting therefrom was caused wholly by the negligence and fault of said steamer "Azalea" and those in charge of her, among other faults, viz:

I. Being a steam vessel, in not keeping clear of a vessel under sail.

II. In changing her course in the manner that she did.

III. In not having a competent lookout.

IV. In not having competent officers in charge of her deck.

V. In not standing by and rendering what assistance should have been required under the act of 1890.

VI. Other faults to be shown at the trial of this cause.

Sixth. That the said schooner "William H. Davenport" by reason of said collision was rendered unmanageable and was taken in tow by a steamtug and placed on the beach at the entrance of New Haven harbor, where temporary repairs were made in order
29 to enable the vessel to complete her voyage to New York.

Seventh. That the said schooner "William H. Davenport" held her course as required by law, and was without fault, and everything was done by those on board of her that could have been done to avoid a collision.

Eighth. That by reason of the said collision it became necessary to employ a steamtug to beach the vessel at New Haven to make temporary repairs there to the said schooner, and that the expense of said repairs, together with damage to the vessel and cargo and proper charges for detention while repairing, will amount to the sum of about six thousand dollars ($6,000).

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your libellant prays that a citation, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interest and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner "William H. Davenport" by the filing of a libel against said schooner on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of

the United States and the practice of this honorable court, to
30 respond for the damages claimed in this cross-libel, and that this honorable court will give to the cross-libellant such other and further relief as in law and justice he may be entitled to receive, this said action being a counter-claim arising from the same cause of action for which the original libel was filed against the said "William H. Davenport."

CONVERS & KIRLIN,
CARVER & BLODGETT,
Proctors for Cross-libellant.

31 STATE AND CITY OF NEW YORK, }
Southern District of New York, } ss:

Charles H. Potter, being duly sworn, deposes and says that he is a member of the firm of Chadwick & Potter, agents in the port of New York for F. S. Bowker, of Phippsburg, Maine, managing owner of the schooner William H. Davenport; that he has read the foregoing cross-libel and believes it to be true. The sources of his information and the grounds of his belief are statements made to deponent by the master and officers of the schooner William H. Davenport. The reason this verification is not made by the said F. S. Bowker is that he is a resident of the district of Maine and is not within one hundred miles of the district of New Jersey or the southern district of New York.

CHAS. H. POTTER.

Sworn to before me this 8th day of December, 1899.

JAMES T. KILBRETH,
[SEAL.] *Notary Public, New York County.*

32 [Endorsed:] United States district court. F. S. Bowker, managing owner of schooner William H. Davenport, against United States of America, owner of steamer Azalea. (Copy.) Cross-libel. Convers & Kirlin, Carver & Blodgett, proctors for cross-libellant, 5 Beekman St., New York, N. Y. Filed Dec. 29, 1899, at 9 o'clock a. m. George T. Cranmer, clerk.

33 *Wm. H. Davenport.*

UNITED STATES OF AMERICA, }
District of New Jersey. }

The President of the United States of America to the marshal of the district of New Jersey, Greeting:

Whereas a cross-libel was filed in the district court of the United States for the district of New Jersey on the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and ninety-nine, by—

F. S. Bowker, managing owner of the schooner William H. Davenport, her tackle, apparel, and furniture, against the United States of

America, owner of the steamer known as the light-house tender "Azalea," her engines, boilers, tackle, apparel, and furniture, and praying that a citation may issue against said respondents pursuant to the rules and practice of this court for the reasons and causes in the said libel mentioned:

You are, therefore, hereby commanded to cite and admonish the said respondents that they be and appear before the said court to be held at Trenton, in and for the district of New Jersey, on the twentieth day of February next, at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to answer the said cross-libel and to make their allegations in that behalf; and what you shall have done in the premises do you then and there make return thereof, together with this writ.

34 Witness the Honorable Andrew Kirkpatrick, judge of said court, at the city of Trenton, in the district of New Jersey, this twenty ninth day of December, in the year of our Lord one thousand eight hundred and ninety-nine, and of our In-
[SEAL.] dependence the one hundred and twenty-fourth.

GEORGE T. CRANMER, *Clerk*,
p. F. R. BRANDT, *Deputy*.

Served the within citation on J. Kearny Rice, U. S. attorney, personally, on the 12th day of Feb'y, A. D. 1900, at Trenton, in the district of New Jersey, by delivering to and leaving with him a copy thereof, and at the same time showing him this original, with the seal of the court attached, and informing him of its contents.

GEO. D. BOWER,
Deputy U. S. Marshal.

Feb. 12, 1900.

Fees, $2.00.

35 [Endorsed:] United States district court. F. S. Bowker, managing owner of schooner William H. Davenport, against United States of America, owner of steamer Azalea. (Copy.) Citation. Convers & Kirlin, Carver & Blodgett, proctors for cross-libelant, 5 Beekman St., New York, N. Y. Filed Feb. 16th, 1900, at 2.40 o'clock p. m. George T. Cranmer, clerk.

36 United States District Court, District of New Jersey.

UNITED STATES
v.
THE SCHOONER WILLIAM H. DAVENPORT. } On Cross-libel.

Notice is hereby given that on Tuesday, the twentieth day of February instant, I shall move before said court to quash the citation served upon me as United States attorney in this cause, upon the ground that no citation can issue against the United States in this matter, and also that the service of the citation upon me as

United States attorney for the district of New Jersey is without warrant of law.

Respectfully, J. KEARNY RICE,
U. S. Attorney.

Dated February 12, 1900.

Messrs. Convers & Kirlin, 5 Beekman St., N. Y. city.
Messrs. Carver & Blodgett, Boston, Mass.

37 [Endorsed:] United States district court, district of New Jersey. The United States *vs.* Schr. William H. Davenport. Notice of motion. Filed Feb. 14, 1900, at 4 o'clock p. m. George T. Cranmer, clerk.

38 United States District Court, District of New Jersey. In Admiralty.

F. S. BOWKER, Managing Owner of the Schooner William H. Davenport,
v.
THE UNITED STATES OF AMERICA, Owner of the Lighthouse Tender Azalea. } Cross-libel.

David O. Watkins, U. S. attorney.
Convers & Kirlin. Carver & Blodgett, for claimants and cross-libelants.

Opinion.

KIRKPATRICK, *J.:*

On the second day of October, eighteen hundred and ninety-nine, the three-masted schooner W. H. Davenport and the steamer Azalea collided in Long Island sound, off the Cornfield Point light-ship. Subsequently the United States of America, the owner of the Azalea, caused a libel to be filed against the William H. Davenport for damages sustained by the Azalea in said collision, and now comes F. S. Bowker, the managing owner of the W. H. Davenport, with a cross-libel alleging that the Azalea was at fault, and praying that citation issue against the United States of America requiring them to appear and answer, that the court shall pronounce for damages against the United States and grant a stay of all further proceedings in the said action brought against the said William H. Davenport until security be given by the United States under the rules of the Supreme Court.

There was a formal issuance of the citation which was
39 served upon the United States district attorney for this district, who immediately gave the following notice:

"Notice is hereby given that I shall move before said court to quash the citation served upon me as United States attorney in this cause upon the ground that no citation can issue against the United States in this matter, and also that the service of the citation upon me as United States attorney for the district of New Jersey is without warrant of law."

It is conceded that the United States cannot be lawfully sued without its consent in any case; but it is insisted that when the Government voluntarily comes into court for the enforcement of a claim, it subjects itself to the rules regulating the practice of the court. Admiralty rule No. 53, which is especially relied on in this case, provides that "whenever a cross-libel is filed upon any counter-claim arising out of the original cause of action for which the original libel was filed, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages as claimed in the cross-bill, unless the court on cause shown shall otherwise direct." The sole object of the rule is to protect the rights of the cross-libelant by compelling the respondent, the libelant in the original action, to give security for any damages which may be awarded against him. I have no doubt that the suit instituted by the Government must proceed in accordance with the rules regulating the practice of the court, nor that this court has the power to make all proper and necessary orders and decrees therein by which the Government must abide. If the cross-libel were properly filed and the citation legally served, so that the respondent was in court in that suit, the court might in its discretion require the respondent to give security under rule No. 53.

40 The rule confers no authority to file the cross-libel, and counsel distinctly disclaims any intention to ask the security for which it alone provides. Can the cross-libel be maintained? I think not. This is not a case analogous to the Siren, 7 Wall., 152, where the court was in possession of the *res* through voluntary action of the Government, nor to the Nuested Sonora de Ragla, 108 U. S., 52, where the vessel was seized by the United States and afterwards libelled by it as a prize of war, and in which damages were awarded against the U. S. because of wrongful seizure. The award was sustained in the Supreme Court because, to use the language of Chief Justice Waite, who delivered the opinion of the court, "we cannot but think that the United States have voluntarily submitted themselves to the court at the instance of the Spanish government, and the consent of the claimant for the purpose of having the question of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases." The submission in this case was made by the chief executive of the government, and the court, considering the question of his right, hesitated to affirm it on general principles, and only did so under the special circumstances of the case. The rule is well settled that the consent which alone enables an independent suit to be brought against the Government or its property must be given by the legislative body, and without the authority of Congress the Government's right of exemption cannot be waived by any of its officers.

Case *v.* Teemett, 11 Wallace, 202.
Carr *v.* U. S., 96 U. S., 433 (438).
U. S. *v.* Lee, 106 U. S., 196 (205).

41 In the case at bar not only has the Government not submitted itself to the jurisdiction of the court, but the prayer of the libellant is that the court awards process against the United States compelling them to appear and answer the complaint made against them. There is no law authorizing the service of this writ upon the United States district attorney, and such service must be set aside. The desirability of having determined at one and the same time all the questions of liability for the collision which is the subject-matter of the original libel has been urged on the court as a reason why it should obtain or retain jurisdiction of the whole case. In Schellinger *v.* U. S., 155 U. S., 166, Mr. Justice Brewer, speaking for the court, after reciting that the United States cannot be sued without their consent, says: "Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government." In my opinion the cross-libel cannot be maintained.

ANDREW KIRKPATRICK, *Judge.*

42 [Endorsed:] United States dist. court, district of New Jersey. Bowker *vs.* The United States. (Copy.) Opinion. Filed Dec. 17, 1900, at 9 o'clock a. m. George T. Cranmer, clerk.

43 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA *v.* THE SCHOONER WILLIAM H. DAVENPORT.	In Admiralty. Order to Set Aside Citation and to Dismiss Cross-libel.
F. S. BOWKER, Managing Owner of the Schooner William H. Davenport, *against* THE UNITED STATES OF AMERICA, Owner of the Light-house Tender Azalea.	

This matter being opened to the court, and the court having heard the parties through their respective counsel, and it appearing that the citation heretofore served upon J. Kearny Rice, former United States attorney for said district, upon the cross-libel heretofore filed in said cause, by F. S. Bowker, managing owner of the schooner William H. Davenport, was illegal and without authority issued and so served, and that the said cross-libel cannot be maintained:

It is on this seventeenth day of December, nineteen hundred—

Ordered that the said citation be quashed, set aside, and for nothing holden, and that the said cross-libel be, and the same is hereby, dismissed with the costs.

On motion of David O. Watkins, United States attorney.

Let the above order be entered in the minutes.

ANDREW KIRKPATRICK, *Judge.*

44 [Endorsed:] United States district court, district of New Jersey. In admiralty. United States of America *v.* The Schooner Wm. H. Davenport. (Copy.) Order to set aside citation and to dismiss cross-libel. David O. Watkins, U. S. attorney. Filed Dec. 17th, 1900, at 11 o'clock a. m. George T. Cranmer, clerk.

45 United States District Court, District of New Jersey.

F. S. BOWKER, Managing Owner of the Schooner William H. Davenport, Cross-libelant, Appellant,
against
THE UNITED STATES OF AMERICA, Owner of the Lighthouse Tender Azalea, Appellee. } Cross-libel.

The above-named cross-libelant, F. S. Bowker, conceiving himself aggrieved by the decree entered in this cause on December 17th, 1900, does hereby appeal from the said decree to the Supreme Court of the United States, and files herewith an assignment of errors setting out separately and particularly each error asserted and intended to be urged. The cross-libelant offers herewith good and sufficient security that he will prosecute his appeal to effect, and if he fails to make his said appeal good will answer all damages and costs; and he thereupon prays that his said appeal may be allowed and that a certificate reciting the questions of jurisdiction upon which the said final decree was made may be sent up, duly authenticated, to the United States Supreme Court.

CARVER & BLODGETT,
CONVERS & KIRLIN
Proctors for Cross-libelant, Appellant.

The foregoing petition is granted and the appeal is allowed this 11 day of January, 1901.

ANDREW KIRKPATRICK,
U. S. Judge.

46 [Endorsed:] United States district court. F. S. Bowker, managing owner of the schr. William H. Davenport, cross-, lib'l't, app'l't, against The United States of America, owner of the lighthouse tender Azalea, appellee. (Copy.) Petition for appeal. Carver & Blodgett, Convers & Kirlin, proctors for cross-lib't, app'l't, 5 Beekman St., New York, N. Y. Filed Jan. 14th, 1901, at 9 o'clock a. m. George T. Cranmer, clerk.

47 United States District Court, District of New Jersey.

F. S. BOWKER, Managing Owner of the Schooner William H. Davenport,
against
THE UNITED STATES OF AMERICA, Owner of the Light-house Tender Azalea.
} Cross-libel.

The cross-libellant herein assigns error to the final decree herein of the United States district court for the district of New Jersey, filed December 17th, 1900, as follows:

First. In that the court quashed the citation issued herein and served upon the United States attorney, the proctor of record for the libellant in the original libel.

Second. In that the court dismissed the cross-libel herein with costs.

Third. In that the court held that this cross-libel against the United States could not be maintained, notwithstanding that the United States had filed and was promoting a civil suit of admiralty cognizance in this court in its own name against the schooner William H. Davenport.

Fourth. In that the court did not find that the United States, by coming into this court and filing and maintaining a libel, as the owner of the Azalea, against the schooner William H. Davenport, submitted itself to the jurisdiction of the court, so as to authorize the court to entertain a cross-libel by the owner of the schooner against the United States, of which notice was given to the United States
48 attorney, and to enter an affirmative decree against the United States therein, as prayed in the said cross-libel, if the findings of fact should warrant such a decree.

Fifth. In that the court did not find that the United States, by coming into this court and filing and maintaining a libel as owner of the Azalea against the schooner William H. Davenport, submitted itself to the ordinary rules and practice in admiralty causes.

Sixth. In that the court did not find that the service of the citation issued under the cross-libel by delivery thereof to the United States attorney, the proctor of record for the libellant in the original libel, gave this court jurisdiction over the United States under the cross-libel.

Seventh. In that the court did not find that the United States, as the original libelant, was bound, under the provisions of the 53rd rule in admiralty, to appear and submit itself to the jurisdiction of the court under the cross-libel after service of process thereunder on its proctor of record in the original suit.

Eighth. In that the court did not find that, in default of the appearance of the United States after the service of process in the cross-libel on its proctor of record in the original suit, it had power to stay proceedings under the original libel.

Ninth. In that the court omitted and refused to hold that on the

facts stated in the certificate herein the court had jurisdiction of this cross-libel and of the United States thereunder.

CARVER & BLODGETT,
CONVERS & KIRLIN,
Proctors for Cross-libellant.

49 [Endorsed:] United States district court. F. S. Bowker, managing owner of the schr. William H. Davenport, against The United States of America, owner of the light-house tender Azalea. (Copy.) Assignment of errors. Carver & Blodgett, Convers & Kirlin, proctors for cross-l'b't, app'l't, 5 Beekman St., New York, N. Y. Filed Jan. 14, 1901, at 9 o'clock a. m. George T. Cranmer, clerk.

50 United States District Court, District of New Jersey.

F. S. BOWKER, as Managing Owner of the Schooner William H. Davenport,
against
THE UNITED STATES OF AMERICA, Owner of the Light-house Tender Azalea.
} Cross-libel.

Know all men by these presents that the City Trust, Safe Deposit and Surety Company of Philadelphia is held and firmly bound unto the above-named The United States of America in the sum of five hundred (500) dollars, to be paid to the said The United States of America; for the payment of which, well and truly to be made, it binds itself and its successors firmly by these presents.

Signed with its seal and dated at the city of New York the 11th day of January, 1901.

Whereas F. S. Bowker, managing owner of the schooner William H. Davenport, has prosecuted an appeal to the United States Supreme Court to reverse the decree rendered in the above-entitled suit by the judge of the United States district court for the district of New Jersey, made and entered in said court on the 17th day of December, 1900:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute said appeal to effect and answer all damages and costs on failure to make his said ap-
51 peal good, then this obligation to be void; otherwise to be and remain in full force and virtue.

[5-c. inter. rev. stamp.]

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA,
160 *Broadway, N. Y.*
JNO. A. SULLIVAN, *Vice-President.*
P. H. MOODY, *Ass't Secretary.*
[SEAL.]

The foregoing bond is approved this 11th day of January, 1901.
ANDREW KIRKPATRICK, *Judge.*

52 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 11th day of January, A. D. 1901, before me personally appeared John A. Sullivan, to me known, who being by me duly sworn, did depose and say: That he resided in the city of New York; that he is the vice-president of the City Trust, Safe Deposit and Surety Company of Philadelphia, the corporation described in and which executed the above instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by section 3, chapter 720, of the New York Session Laws of 1893.

And the said John A. Sullivan further said, that he was acquainted with Patrick H. Mooney and knew him to be the assistant secretary of said corporation; that the signature of said Patrick H. Mooney subscribed to said instrument is in the genuine handwriting of said Patrick H. Mooney, and was thereto subscribed by the like order of said board of directors and in the presence of him, the said John A. Sullivan, vice-president.

EMMA A. BENNETT,

[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county, # 227.

At a regular meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, for the purposes of organization, on the eleventh day of May, A. D. 1897, the following resolutions were adopted:

On motion of Dr. Baker, duly seconded, Mr. Stephen Farrelly, of the city of New York, was duly elected a vice-president of the company, resident in the city of New York, in the State of New York, with full power to execute in the name of the company, and to affix the corporate seal and duly acknowledge the same, any and all bonds or contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company, in the State of New York.

On motion of Dr. Baker, duly seconded by Mr. Sailer, Mr. John McAnerney, of the city of New York, was duly elected a vice-president of the company, resident in the city of New York, in the State of New York, with full power, in the absence of Mr. Stephen Farrelly, resident vice-president, to execute in the name of the company, and to affix the corporate seal and duly acknowledge the same, any and all bonds or contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company, in the State of New York.

On motion of Dr. Baker, duly seconded by Mr. Sailer, Mr. John A. Sullivan, of the city of New York, was duly elected a vice-president of the company, resident in the city of New York, in the State of New York, with full power in the absence of Mr. Stephen Farrelly, resident vice-president, to execute in the name of the company, and

to affix the corporate seal and duly acknowledge the same, any and all bonds or contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company, in the State of New York.

On motion of Dr. Baker, duly seconded by Mr. Sailer, Mr. John A. Sullivan was elected as assistant secretary of the company, in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds or contracts of suretyship which have been signed by Mr. Stephen Farrelly, or Mr. John McAnerney, its resident vice-presidents, in the conduct of the business of the company, in the State of New York.

At a regular monthly meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, on the ninth day of January, 1899, the following resolution was adopted:

On motion of Mr. Potts, duly seconded by Dr. Baker, Mr. Patrick H. Mooney was elected as assistant secretary of the company, in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds or contracts of suretyship which have been signed by Mr. Stephen Farrelly, or Mr. John McAnerney, or Mr. John A. Sullivan, its resident vice-presidents, in the conduct of the business of the company, in the State of New York.

At a regular meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, for the purposes of organization, on the sixteenth day of May, A. D. 1900, the following resolution was adopted:

On motion of General Wagner, duly seconded, the following gentlemen were unanimously re-elected as vice-presidents and assistant secretaries in the various places named:—Vice-presidents at New York, Stephen Farrelly, Colonel John McAnerney, John A. Sullivan; assistant secretaries at New York, John A. Sullivan, Patrick H. Mooney.

At a regular monthly meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia on the ninth day of July, A. D. 1900, the following resolutions were adopted:

On motion of Dr. Baker, duly seconded by Mr. Richardson, Mr. William H. Kimball, of the city of New York, was duly elected a vice-president of the company, resident in the said city of New York, in the State of New York, with full power to execute in the name of the company, and to affix the corporate seal, and duly acknowledge the same, any and all bonds and contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company, in the said State of New York.

On motion of Mr. Richardson, duly seconded by Mr. Banes, Mr. John A. Sullivan was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. William H. Kimball, its resident vice-president,

in the conduct of the business of the company, in the said State of New York.

On motion of Mr. Banes, duly seconded by General Wagner, Mr. Patrick H. Mooney was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. William H. Kimball, its resident vice-president, in the conduct of the business of the company, in the said State of New York.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Patrick H. Mooney, assistant secretary of the City Trust, Safe Deposit and Surety Company of Philadelphia, *have* compared the foregoing resolutions with the originals thereof, as recorded in the minute book of the said company, and do- certify that the same are a correct and true transcript thereof.

Given under my hand and the seal of the company, this 11th day of January, A. D. 1901.

P. H. MOONEY,
Assistant Secretary. [SEAL.]

Statement of the City Trust, Safe Deposit and Surety Company of Philadelphia.

Incorporated 1886.

On the thirtieth day of June, 1900, the assets and liabilities of the company were:

Assets.		*Liabilities.*	
Cash on hand	$82,030.74	Capital stock	$500,000.00
Cash in banks	492,206.23	Surplus fund	150,000.00
Call loans upon collaterals	964,305.65	Reinsurance reserve	126,357.00
		Undivided profits	65,465.27
Time loans upon collaterals	404,660.00	Deposits	2,304,793.32
		Miscellaneous liabilities.	8,430.00
Loans upon bonds and mortgages	87,200.00		
Investment securities owned, stocks, bonds, &c.	423,130.50		
Real estate, furniture and fixtures	535,670.54		
Miscellaneous assets	165,841.93		
Total	$3,155,045.59	Total	$3,155,045.59

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Patrick H. Mooney, being duly sworn, says that he is assistant secretary of the City Trust, Safe Deposit and Surety Company of Philadelphia, and that the above is a correct statement of the financial condition of the company on June 30, 1900.

P. H. MOONEY.

Sworn to and subscribed before me, this 11th day of January, A. D. 1901.

EMMA A. BENNETT,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county, #227.

53 [Endorsed:] United States district court, district of New Jersey. F. S. Bowker, managing owner of the schooner William H. Davenport, cross-libelant, appellant, against The United States of America, respondent. (Copy.) Bond on appeal of the City Trust, Safe Deposit and Surety Company of Philadelphia, dated the — day of ——, —. Carver & Blodgett, Convers & Kirlin, proctors for cross-libelant. Filed Jan. 14th, 1901, at 9 o'clock a. m. George T. Cranmer, clerk.

54 United States District Court, District of New Jersey.

F. S. BOWKER, Managing Owner of the Schooner William H. Davenport, Cross-libelant, Appellant,
v.
THE UNITED STATES OF AMERICA, Owner of the Light-house Tender Azalea, Appellee.
} In Admiralty.

Citation.

To the United States of America, appellee, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be held at the city of Washington, in the District of Columbia, on the thirteenth day of February, A. D. 1901, pursuant to an appeal filed in the clerk's office of the district court of the United States for the district of New Jersey, wherein F. S. Bowker, managing owner of the schooner William H. Davenport, is cross-libellant and appellant and The United States of America, owner of the light-house tender Azalea, is respondent and appellee, to show cause, if any there be, why a decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness the Honorable Andrew Kirkpatrick, judge of the
55 district court of the United States for the district of New Jersey, this fourteenth day of January, A. D. 1901.

ANDREW KIRKPATRICK, *Judge.*

CONVERS & KIRLIN,
CARVER & BLODGETT,
Proctors for Cross-libelant and Appellant.

Service of a copy of the within citation acknowledged this fourteenth day of January, A. D. 1901.

DAVID O. WATKINS,
U. S. Attorney for the District of New Jersey.

56 [Endorsed:] United States district court, district of New Jersey. F. S. Bowker, managing owner of the schooner William H. Davenport, cross-libelant, appellant, *v.* The United States of America. Citation. Filed Jan. 14th, 1901, at 12 o'clock m. George T. Cranmer, clerk.

57 UNITED STATES OF AMERICA, } *District of New Jersey,* } *ss:*

I, George T. Cranmer, clerk of the district court of the United States for the district of New Jersey, do hereby certify that the foregoing is a true copy of certificate of Judge Andrew Kirkpatrick, libel, claim, stipulation for claimants' costs, stipulation for value, answer, cross-libel, citation, notice of motion, opinion, order to set aside citation and to dismiss cross-libel, petition for appeal, assignment of errors, bond on appeal, and citation, in the suit of The United States of America against The Schooner William H. Davenport—F. S. Bowker, managing owner of the schooner William H. Davenport, against The United States of America, owner of the light-house tender Azalea—as the same remains of record and on file in my office.

Seal District Court of the United States, District of New Jersey.

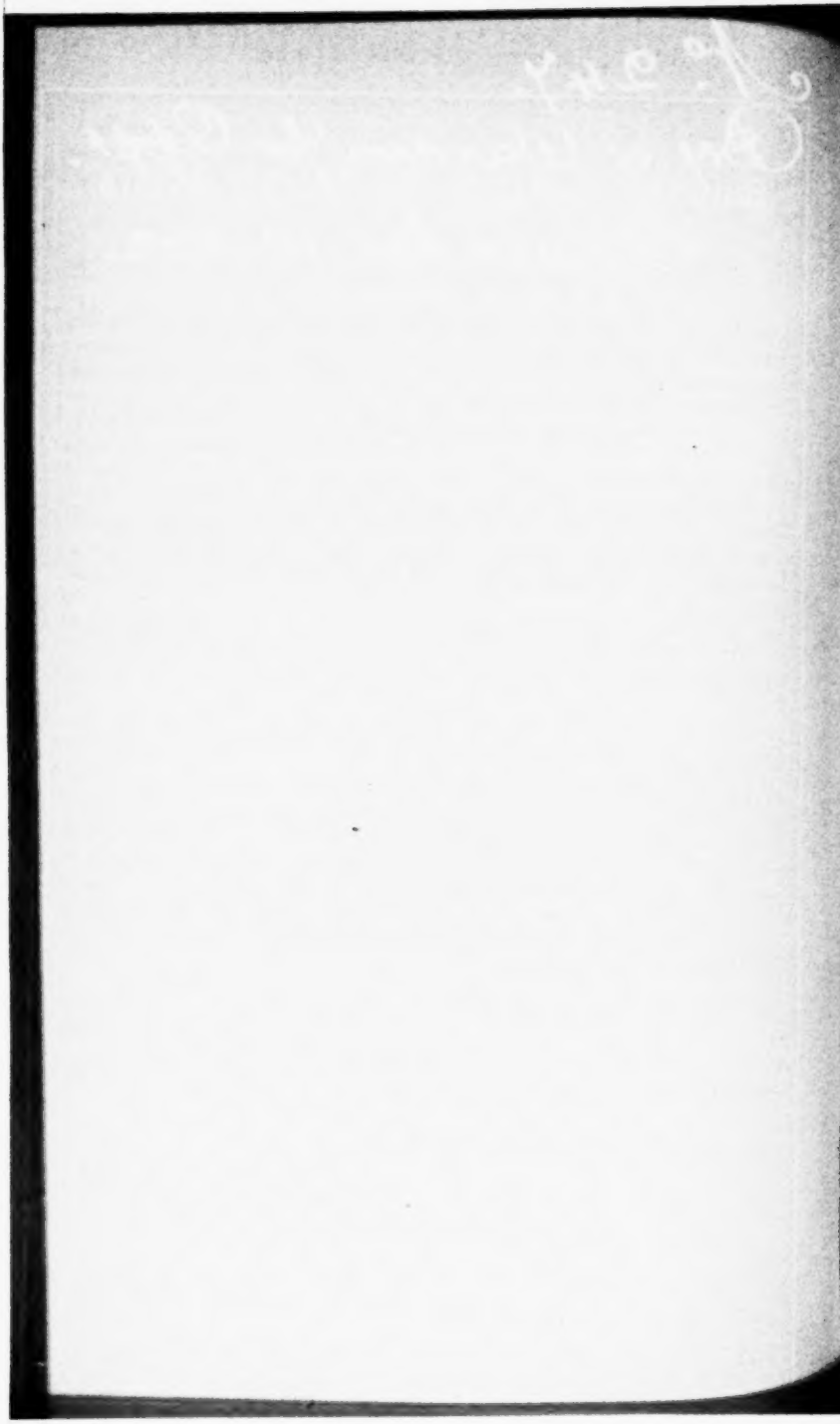
In testimony whereof I have hereto subscribed my name and affixed the seal of said court, at Trenton, in said district, this fourteenth day of January, A. D. nineteen hundred and one.

GEORGE T. CRANMER, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Jan. 14, 1901. G. T. C. }

58 [Endorsed:] United States district court, district of New Jersey. F. S. Bowker, managing owner of the schooner William H. Davenport, cross-libelant, appellant, against The United States of America, owner of the light-house tender Azalea, appellee. Copy. Certificate. Filed Jan. 14th, 1901, at 9 o'clock a. m. George T. Cranmer, clerk.

Endorsed on cover: (Certificate.) File No., 18,047. New Jersey D. C. U. S. Term No., 562. F. S. Bowker, managing owner of the schooner "William H. Davenport," appellant, *vs.* The United States, owner of the light-house tender "Azalea." Filed February 6, 1901.



No. 247.
Brf. of Wardner for Appt.
Supreme Court of the United States.
Filed Apr. 18, 1902.
FILED
APR 18 1902
JAMES H. MCKENNEY
Clerk.

OCTOBER TERM, 1901.

No. 247.

F. S. BOWKER,

MANAGING OWNER OF THE SCHOONER "WILLIAM H. DAVENPORT,"

v.

THE UNITED STATES,

OWNER OF THE LIGHTHOUSE TENDER, "AZALEA."

APPELLANT'S BRIEF.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BOSTON
GEO. H. ELLIS CO., PRINTERS, 272 CONGRESS STREET
1902

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v.

THE UNITED STATES,

OWNER OF THE LIGHTHOUSE TENDER "AZALEA."

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

APPELLANT'S BRIEF.

This is an appeal from a decision of the District Court for the District of New Jersey, dismissing a cross-libel filed by the appellant and quashing the citation under said cross-libel.

STATEMENT OF THE CASE.

On October 2, 1899, the schooner "William H. Davenport," of which the appellant was the managing owner, came into collision with the lighthouse tender "Azalea," belonging to the United States, and on November 3, 1899, the United States, by J. Kearny Rice, attorney for the District of New Jersey, filed a libel in the District Court for the Dis-

trict of New Jersey against the "William H. Davenport," to recover five thousand dollars damages alleged to have been sustained by the "Azalea" in said collision.

Process in due form issued, the schooner was arrested, and on November 22, 1899, the appellant filed in the said court a claim to said schooner on behalf of the owners thereof, and also stipulations for costs and for value. On December 11 he filed an answer, alleging that the collision was caused wholly by the fault of the "Azalea," and on December 29, 1899, filed a cross-libel to recover the sum of six thousand dollars damages, alleged to have been sustained by the "William H. Davenport" in the said collision. It was alleged in the cross-libel that the collision was wholly due to the negligence of the "Azalea."

The prayer of the said cross-libel asked "that a citation according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages with interests and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner 'William H. Davenport' by the filing of a libel against said schooner on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross-libel, and that this honorable court will give to the cross-libellant such other and further relief as in law and justice he may be entitled to receive, this said action being a counter-claim arising from the same cause of action for which the original libel was filed against the said 'William H. Davenport.'"

On December 29 a citation issued and was served on J.

Kearny Rice, then United States attorney for the District of New Jersey, who was the proctor of record for the libellant in the original libel.

On February 14, 1900, the United States attorney filed the following notice of motion: "Notice is hereby given that I shall move before said court to quash the citation served upon me as United States attorney in this cause upon the ground that no citation can issue against the United States in this matter, and also that the service of the citation upon me as United States attorney for the District of New Jersey is without warrant of law." The court adjudged that the citation be quashed, and that the said cross-libel be dismissed with costs.

On January 11, 1901, an appeal by the cross-libellant was allowed by the said District Court on the questions of jurisdiction, argued before it, and at the same term at which the final decree was entered the said questions were certified to this court, pursuant to the statute and rules of the court touching such appeals. The questions of jurisdiction and the assignments of error are set out in the record on pages 3 and 19, respectively.

PRELIMINARY MATTERS.

The learned judge of the District Court obviously thought that the case involved, to a certain extent, a consideration of the doctrine of the government's immunity from suit in its own courts, in regard to which doctrine it was said by Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446 at page 447, that "the questions raised have rarely been free from difficulty, and the judges of this court have not always been able to agree in regard to them. Nor is it an easy matter to reconcile all the decisions of the court in this class of cases."

It may be an aid to clearness, therefore, if certain of the

difficulties that this subject has presented be cleared away from this case.

As was said by the same learned justice in the same case, at page 451, "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court by the Constitution."

If the opinion of Lord Justice Brett, as expressed by him in "The Parlement Belge," 5 P. D. 197, is correct, that in proceedings *in rem* the owner of the *res* is in reality impleaded, it would follow that the rule of law as laid down by Mr. Justice Miller in the language above cited would involve the exemption of government property from seizure by proceedings *in rem*.

If, however, the doctrine of Lord Justice Brett is to be accepted, it is difficult to see on what principle such cases as "The Siren," 7 Wall. 152, and "The Davis," 10 Wall. 15, can be supported. It is probable that the doctrine of Lord Justice Brett would not be followed by this court. As was said by Mr. Justice Gray in "The John G. Stevens," 170 U. S. 113, at page 120, "The foundation of the rule that collision gives to the party injured *a jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text-writers on both sides of the Atlantic, has been more clearly established and more fully carried out in this country than in England."

It is obvious, of course, that there is as much need of the exemption of public property, at least certain kinds of public property, from legal process as there is of the exemption of

the government from direct suit; and, in fact, certain classes of public property have long enjoyed such exemption.

United States v *Barney*, 3 Hughes, 545.
United States v. *Wilder*, 3 Sumner, 308.
"The Fidelity," 16 Blatchf. 569.

It seems to have been the opinion of Mr. Justice Story and Mr. Chief Justice Waite that the exemption of public property from legal process must be confined to public property "devoted to public uses and necessary for carrying on the operations of the government." Yet we find that in "The Siren," *ubi supra* at page 154, Mr. Justice Field, speaking of the exemption of the United States, said: "The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property."

This language was quoted with approval by Mr. Chief Justice Fuller in *Stanley* v. *Schwalby*, 147 U. S. 508, 512, and by Mr. Justice Gray in the case of *Belknap* v. *Schild*, 161 U. S. 10, 16.

The extent of the immunity of government property from legal process is perhaps, therefore, not absolutely clear. But it is not necessary to meet the difficulty, if any exists in this case, for the reason that it is not proposed to subject any property of the United States to any legal process

Another question which has given rise to very serious difficulty is the question as to when a suit to which the United States or a State is not nominally a party is, nevertheless, to be considered a suit against the United States or a State.

Osborne v. "*The Bank*," 9 Wheaton, 738, and *United States* v. *Lee*, 106 U. S. 196, are typical instances of suits that were held to be maintainable, although a State and the United States were the real parties in interest, but were not nominally parties of record.

Louisiana v. *Jumell*, 107 U. S. 711, and *Stanley* v. *Schwalby*, 147 U. S. 508, are typical instances of suits which were held not to be maintainable against a State and the United States, although neither the State nor the United States were nominally parties to the record.

The line of demarcation between the two classes of cases is laid down, with as much precision as the nature of the subject will permit, in the case of *Belknap* v. *Schild*, 161 U. S. 10, 18. The difficulties presented by this kind of a question are not involved in the case at bar, for there is here no intervention of any third person.

Again, it seems to be the doctrine of "The Siren" that government property, at least that portion of it that is not devoted to public uses, is subject to process *in rem*, provided the property can be taken on such process without disturbing or removing it from the possession of the government. It is easy to see that difficult questions may arise as to when such property may be said not to be in the possession of the government; but no such difficulty can arise in this case, as it is not proposed to take possession of any government property whatsoever.

I.

The appellant contends that the record does not show any such proceeding against the United States or its property as would warrant the District Court in dismissing the cross-libel.

The appellant bases this contention on Rule 53 of the Admiralty Rules of the Supreme Court, which provides that, "whenever a cross-libel is filed upon any counterclaim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages as claimed in said cross-libel, unless the court on cause shown

shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

It seems to have been the opinion of the learned judge of the District Court that proceedings cannot be stayed under Rule 53, unless the court has actually acquired jurisdiction of the libellant in the original libel, or of the vessel of said libellant, by legal service of process upon the libellant or the vessel. That this is the view of the learned judge is apparent from his statement that, "if the cross-libel were properly filed and the citation legally served, so that the respondent was in court in that suit, the Court might in its discretion require the respondent to give security under Rule No. 53. The rule confers no authority to file the cross-libel."

If this construction of Rule 53 is sound, it would follow that a cross-libel *in rem* could never be maintained where the vessel was out of the jurisdiction, inasmuch as legal service of a process *in rem* can only be effected by a seizure of the *res*, and no substitute service upon the proctors of the libellant in the original cause would be of avail.

Again, if it is not true, which the appellant denies, as a general rule, that process issuing under a cross-libel can be legally served upon the proctor of the libellant in the original cause, or, if, where the United States or a State, or any government, is the moving party, the doctrine of such cases as "The Siren," 7 Wall. 152, and "The Davis," 10 Wall. 15, does not apply, as the learned judge of the District Court seemed to think, and process issuing under the cross-libel cannot legally be served on the libellant or his proctor, it would follow, according to the above construction of Rule 53, in the one case that the rule would never apply where the libellant in the original libel was out of the jurisdiction; and that in the other case it would never apply where the libellant in the original libel was the United States, any State of the United States, or any foreign government.

The language of the rule itself does not contemplate any

such result, and makes a right to a stay of proceedings dependent, not upon acquiring jurisdiction of the libellant in the original cause, but solely upon the filing of a cross-libel.

Such a construction is contrary to the language of the rule, and prevents its accomplishing the very purpose for which it was enacted.

a. Origin and History of Rule 53.

The rule, which was promulgated December 2, 1868 (7 Wall. V.), was undoubtedly taken from Section 34 of the English Admiralty Court Act of 1861 (24 Vict., c. 10).

> *Old Dominion S.S. Co.* v. *Kufahl*, 100 Fed. Rep. 331. (D. C. E. D. N. Y. 1900.)

Section 34 of the Admiralty Court Act provided,—"The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause."

A similar provision is made in the Admiralty Court Act of Ireland (1867). See 30 and 31 Vict., c. 114, s. 72.

The provisions of the Admiralty Court Acts no doubt had their origin in the advantage which, in the early admiralty practice, the libellant had over the respondent; and this advantage in turn rested on the necessity in certain cases for a cross-libel.

As at the common law, there was never any right of set-off in the Admiralty.

"The Dove," 91 U. S. 381.
Snow v. *Carruth*, 1 Sprague, 324.
Nichols v. *Tremlett*, 1 Sprague, 361.
Dexter v. *Munroe*, 2 Sprague, 39.
"The Hudson," Olc. 396.
Bains v. "*The James and Catherine*," Baldw. 544.
Willard v. *Dorr*, 3 Mason, 161.
"The Nadia," 18 Fed. Rep. (C. C. E. D. Tex. 1883) 729.
"The Journeyman," 60 Fed. Rep. (D. C. N. D. N. Y. 1894) 295.
Anderson v. *Pacific Coast Co.*, 99 Fed. Rep. (D. C. N. D. Cal. 1900) 109.
"The Lady Campbell," 2 Hagg. 14, note.

But it has always been permissible for the respondent to set up in his answer that he has suffered damage growing out of the same cause of action for which the libel was filed, and to reduce the libellant's damage by the amount of damage suffered by the respondent, even to the extent of totally cancelling the libellant's claim. See the cases above cited and also:—

Bearse v. *Ropes*, 1 Sprague, 331.
Kennedy v. *Dodge*, 1 Ben. 311.
Thatcher v. *McCulloh*, Olc. 365.
Bradstreet v. *Heran*, Abb. Adm. 209.
Zerega v. *Poppe*, Abb. Adm. 397.
Holyoke v. *Depew*, 2 Ben. 334.
Ebert v. "*The Reuben Doud*," 3 Fed. Rep. (D. C. E. D. Wis. 1880) 520.
"The Two Brothers," 4 Fed. Rep. (D. C. W. D. Tenn. 1880) 158.

Gillingham v. *Charleston Tow Boat, etc., Co.*, 40 Fed. Rep. (D. C. S. C. 1889) 649.

O'Brien v. 1614 *Bags of Guano*, 48 Fed. Rep. (D. C. Va. 1892) 726.

"The Frank Gilmore," 73 Fed. Rep. (D. C. W. D. Pa. 1896) 686.

"The Livingstone," 104 Fed. Rep. (D. C. W. D. N. Y. 1900) 918, 926.

"The North American," Lush. 79.

But damages could never be decreed upon an answer to the original libel; and, consequently, whenever the respondent desired to prefer such a claim, he was obliged to file an answer to the original libel, and also to institute a cross action. See the cases above cited and

"The Tom Lyle," 48 Fed. Rep. (D. C. W. D. Pa. 1891) 690.

If he contented himself with setting up his damages in his answer, he could not afterwards file a cross-bill, as he would not be permitted to split up his demand and litigate the same question twice.

Snow v. *Carruth, ubi supra.*

Nichols v. *Tremlett, ubi supra.*

Kennedy v. *Dodge, ubi supra.*

"The Ciampa Emilia," 39 Fed. Rep. (D. C. S. D. N. Y. 1899) 126.

The hardship resulting from these doctrines is manifest. For instance, in collision cases it frequently happens that the defence of a libelled vessel is that the vessel of the libellant was in fault, and that the owner of the former should recover damages from the owner of the latter. If the owner of the libelled vessel contented himself with setting up his damage in his answer, he could not afterwards bring any proceeding

against the libellant or his vessel, although it might turn out that the respondent's ship was not in fault and had suffered more damage than the libellant's vessel. In many cases it would be impossible to bring a cross-libel for the reason that the libellant in the original libel might be out of the jurisdiction, or, if within the jurisdiction, he might be irresponsible, and his vessel might be beyond the jurisdiction.

The courts struggled hard to alleviate the condition of a respondent in admiralty who desired to file a cross-libel. "Formerly it sometimes happened where a cause and a cross cause were instituted that great injustice was done where the ship of the defendant was arrested, and it was not possible to arrest the ship of the plaintiff. In such cases the court had no power to stay the proceedings, but it did its utmost to place the parties on an equality and where in the principal action a decree was pronounced that both parties were in fault, it was the practice of the court to withhold the payment of the moiety of the damages sustained by the plaintiff's ship until the plaintiff in that action submitted to the deduction of a moiety of the damages sustained by the other ship, or suffered the cross action to be prosecuted."

Williams' & Bruce's Practice in Adm., 2 ed. p. 370.

Citing

"The North American," Lush. 79 and
"The Seringapatam," 3 W. Rob. 38.

See also

"The Carlisle," 6 W. R. 197.

So, in the case of a collision between "The Heart of Oak," an English vessel, and a French vessel, where the owners of the latter arrested the former and a cross action was brought by the owners of "The Heart of Oak," the court held that it had no power to stay proceedings, but said, "It is compe-

tent to the owners of *The Heart of Oak*, under these circumstances, not being able to get an appearance put in, to make service upon the proctor for the owners of the *Duc de Trevise* in the other case, and, if he does not then put in an appearance, to proceed in *absentia* to obtain a decree; and, undoubtedly, the Court would not allow the damages to be paid out if judgment went against *The Heart of Oak* in the first action until an appearance has been entered on behalf of the *Duc de Trevise* in the second."

See

"The Heart of Oak," 29 L. J. Adm. (N. S.) 78.

The efforts of the court indicated by the above citations applied to a very limited class of cases, and another effort to alleviate the condition of respondents appeared in the English Admiralty Court Rules of 1859, Rule 171, which provided that, "where a party is suing in a damage cause, and a cross cause *in personam* is instituted, the service of the citation in the cross cause may be made on the proctor of the party suing in the original cause, and such service shall be sufficient."

Williams & Br., Practice in Adm., 2d ed., p. 576.

It is probable that a respondent had this right prior to the passing of the above rule.

"The Heart of Oak," 29 L. J. Adm. (N. S.) 78.
"The Eliza Lines," 61 Fed. Rep. (C. C. D. Mass. 1894) 308.

This rule relieved the difficulty in the way of service in most libels *in personam*; but it still left the respondent without any security for his costs or for his damages, in case of a recovery by him, and could not, of course, enable the respondent to bring a cross-libel *in rem* where the vessel of

the original libellant was out of the jurisdiction. It was these defects which Section 34 of Chapter 10 of the English Admiralty Court Act and Section 72 of Chapter 114 of the Irish Admiralty Court Act were intended to remedy.

In "The Cameo," Lush. 408, which was a case of a collision between two British ships, after the institution of a libel *in rem* the respondent therein filed a cross action *in personam*. Deane, Q. C., *arguendo*, said, "It is submitted that the purpose of this enactment was to provide a cross remedy against a plaintiff who is out of the jurisdiction of the Court, against whom no proceedings or no effectual proceedings can otherwise be taken." The Court (Dr. Lushington) did not deny that the act applied to the situation suggested by counsel, but said further, "The present case appears to me to be within the very purpose of the enactment, which, according to the experience of the Court, was much required. The intention of the act was to put the two contending parties on a fair footing; the language is general, not drawing any distinction between persons in and persons out of the jurisdiction; and I do not think it makes any difference that the plaintiff is within the jurisdiction of the Court, whatever powers of execution the Court may now possess, for such security cannot be considered as at all equivalent to the security of bail."

In "The Charkieh," L. R. 4 A. and E. 120, which was the case of a libel *in rem* against a foreign ship, and a cross-libel *in personam*, Clarkson *arguendo* said, "The statute was never meant to apply to a case where there was no property capable of being arrested; in the cross cause it was only meant to apply to a case where the property was in existence, but for some cause could not be arrested. The 34th Section of the Admiralty Court Act, 1861, applies only where both the cause and the cross cause are *in rem*, it has no application to a case like the present, where the cross cause is *in personam*." The court (Sir Robert Phillimore), replying to this

contention, said: "The Court ought not to be astute to find other than a liberal meaning for the section of a remedial statue; . . . the Court has, I think, under the provisions of that section, power to stay the proceedings in the principal cause until such time as security to answer judgment shall have been given in the cross cause, and I am of opinion that it is equitable that such should be the rule. . . . The section in question was expressly passed to remedy the former curtailed practice of the Court, and I am of opinion the defendant is entitled to the order he asks for."

In "The Newbattle," 10 P. D. 33, there was a collision between the "Newbattle" and the "Louise Marie," a public vessel, property of the king of the Belgians. The "Newbattle" having been arrested, her owners counter-claimed, and the registrar ordered all proceedings in the action against the "Newbattle" stayed until the plaintiffs therein gave security to answer the counter-claim. A motion to rescind the order was overruled. It was contended that such an order could only be made in a cross action, not in a simple counter claim. Butt, J., said that the legislature had thought fit to provide that, when for some reason the ship of the plaintiff could not be arrested by the counter-claimant, security should be given by the former, and that the "Louise Marie" could not be arrested, being a public ship of the king of the Belgians. On appeal, Brett, M.R., said: "If a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him." Cotton, L. J., said: "There is here a counter-claim, which is the same as a cross action, and section 34 of the Admiralty Court Act, 1861, gives the same power to make the order subject to the question whether it can be made against a foreign sovereign. . . . When a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. . . . It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a

cross-action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security." Lindley, L. J., said, "A counter-claim seems to me to be equivalent to the cross action mentioned in the Admiralty Court Act, 1861." Butt, J., pointed out that security for costs had been required of foreign governments, and saw no reason, therefore, why they should not be required to give security for damages. It had been provided by Order xix., r. 3, of the Rules of the Supreme Court, that a counter-claim was to have the same effect as a cross action.

In accord with the "Newbattle" see Williams' & Br., Pr. in Adm., 2d ed., 371.

In "The Rougemont," [1893] L. R. P. D. 275, where in a case of collision an action *in personam* was brought and thereafter the defendants in said action instituted proceedings *in rem* against the ship of the plaintiffs in the said action, and the two cases were afterwards consolidated, the defendants in the personal action to be counter-claimants against the plaintiffs, the court held that under the old practice the proceedings *in rem* would have been a cross cause.

The history of Rule 53 is similar.

It is true that in "The Bristol," 4 Ben. 55, Judge Blatchford held that the object of the rule was to "compel the appearance and giving of security by a respondent in a cross-libel *in personam*, in cases where it" did "not appear proper that he should be relieved from giving such security." And he refused to stay proceedings in a case where a cross-libel *in rem* had been filed. But in "The Toledo," Brown's Adm. 445, Judge Longyear held that proceedings in the original suit could be stayed in such a case. The cross-libel was *in rem*, and no process was issued. The court said: "The ground of the motion is that Rule 53 applied to libels and cross-libels *in personam* only and not to those *in rem*. The

language of the rule in describing the subject matter to *which it relates is certainly broad enough to cover both* classes of cases; and looking at that and at the evil which the rule was evidently intended to remedy, it does not seem to me to admit of a doubt that such is the scope and effect of the rule. Before the rule, no security could be obtained, or proceedings had upon a cross-libel without the issuing and service of process. On this account, it often resulted that any remedy by cross-libel was impossible, on account of the libellant in the original libel, in an action *in personam*, or the vessel represented by the vessel in an action *in rem*, being and removing beyond the same jurisdiction. This often resulted in the grossest injustice and oppression, equivalent in some cases to an absolute failure of justice. The respondent or claimant in the original suit in such cases, was obliged to follow the libellant, or the vessel, into other, and often foreign jurisdictions, involving ruinous outlay and delays, and often when arriving where the libellant or the vessel was he found there was no admiralty jurisdiction of the particular cause of action in question, on account of which he was deprived of the power to obtain security by the seizure of the vessel, and was obliged to resort to a cause of action at common law or forego his remedy; and that, too, while his opponent had full benefit of security by seizure under our admiralty jurisdiction. . . . If I am correct in this then it would deprive it of its chiefest virtue to limit it to actions *in personam* alone, and I can see no good reason in the nature of cases to which it relates for so limiting it in its application. . . . In case of a counter-claim being set up, a cross-libel is necessary, not to give the Court jurisdiction of the subject matter, it already has that, but in order to entitle the party setting up such claim to affirmative relief. . . . The seizure is therefore not necessary to give the Court jurisdiction of such counter-claim independently of Rule 53; and before that rule a seizure was necessary only as a security for the enforcement of

the remedy. The means of obtaining that security without the necessity of process and seizure is provided for in the rule, and I can see no good reason, constitutionally or otherwise, why it cannot be done in that manner. Neither can I see anything in the language of the rule by which its application is necessarily limited to actions *in personam*." The court considered the case of "The Bristol," *ubi supra*, but felt compelled to differ from the decision in that case.

In "The George H. Parker," 1 Flippin, 606, the court held, in a case of collision between a barge and a tug, where the owners of the barge had libelled the tug and the owners of the tug at the date of the libel prayed in their answer that the owners of the tug at the date of the collision might be required to come in and defend, that, the owners at the date of the collision having come in and filed a cross-libel, they were entitled to a stay of proceedings in the original cause under Rule 53, the court (Brown, J.) saying that it regarded this proceeding as a "cross-libel within the spirit and scope of the Rule," and that "the reasons which dictated the adoption of this rule apply as forcibly to this case as if the cross-libellants were now owners of the tug."

In "*Vianello*" v. *The Credit Lyonnais*, in the District Court for the Southern District of New York, 1883, 15 Fed. Rep. 637, in which the original libel was *in rem* against an Italian ship to recover the value of iron not delivered according to a bill of lading, and the owners of the vessel filed a cross-libel *in personam* to recover the freight, the court (Brown, J.) said, "It is just that in such cases each side should be similarly protected by security; and the original libellants having obtained security for their alleged claim by the arrest of the bark, they ought not to complain of being required to furnish security in turn upon the counter-claim. Such I think was the intention of this rule."

In "*Empresa Maritima à Vapor*" v. *The North & South American Steam Navigation Co.*, in the District Court for the

Southern District of New York (1883), 16 Fed. R. 502, where charterers libelled the chartered vessel for breaches of the charter party, and the owners filed a cross-libel *in personam* and moved for security under Rule 53, the original libellants being without the jurisdiction, the court (Brown, J.) said: "The object of Rule 53, I cannot doubt, was that in cases of cross demands upon the same subject of litigation both parties should stand upon equal terms as regards security. It was designed, where the libellants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross suit *in personam* for a counterclaim in respect to the same subject of litigation, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the Court upon the point in controversy should be in their favor. The rule was designed to correct the inequality and injustice of the process of Court *in rem* being used to obtain security in favor of one party, in reference to a single subject of dispute, while it was denied to the other. Where the security obtained by the libellant in the suit *in rem* is the vessel itself under seizure, which in this case is of great value, and where the libellant is a foreign corporation, having no tangible property here, the reasons for the application of the rule are specially urgent."

In the *Southwestern Transportation Co.* v. *Pittsburg Coal Co.* in the District Court for the Eastern District of Louisiana (1890), 42 Fed. Rep. 920, where there was a libel *in personam* for salvage and a cross-libel, whether *in rem* or *in personam* it does not appear, and an order had been made staying proceedings in the original libel under Rule 53, the court vacated the order on the ground that the damages set up in the cross action did not grow out of the cause of action for which the original libel was filed. The court did not advert to the fact that the original libel was *in personam*; and so, of course, no arrest had been made of any vessel, which

would have been a ground for disposing of the case if a stay of proceedings under Rule 53 could not be had in such a situation.

In "The Electron," in the District Court for the Southern District of New York (1891), 48 Fed. Rep. 689, the court (Brown, J.) held that a motion for the stay of proceedings under the rule ought not to be granted if it appeared that the court had not jurisdiction of the cause of action stated in the cross-libel.

In *Franklin Sugar Refining Co.* v. *Funch*, in the District Court for the Eastern District of Pennsylvania (1895), 66 Fed. Rep. 342, the court (Butler, J.) held that the rule was not applicable where the original libel was *in personam;* but the Circuit Court of Appeals in its opinion in the same case (73 Fed. Rep. 844), as was pointed out by the court in *Genthner* v. *Wiley*, in the District Court for the District of Massachusetts (1898), 85 Fed. Rep. 797, ignored this statement, although it would have been applicable to the case before them; and in *Steamship Co.* v. *Hagar*, 78 Fed. Rep. 642 (1897), Judge Butler himself said that the language of the rule applied to all cases, and this plain language he did not feel at liberty to disregard.

In *Steamship Co.* v. *Hagar* the court said: "The libellants urge that as they reside here and may be served, security should not be required; that the object of the rule is simply to compel the original libellants (when foreigners) to appear. If such had been the object it could have been attained more readily by providing for service on the proctors of such libellant. Again if an appearance alone was contemplated the security should be for an appearance simply; and the rule would doubtless have so provided. It is more probable that the object was to place the parties on an equality."

b. True Construction of the Rule.

It is to be observed that the wording of Section 34 of the Admiralty Court Act is such that it is doubtful whether it is applicable, as is Rule 53, to a case where the original libel is *in personam*.

Cf. "The Rougemont," *ubi supra*.

Apart from this the act and the rule are identical in spirit and purpose and in the construction to be put upon them, and under neither is it a condition precedent to a stay that jurisdiction be acquired of the libellant in the original cause by legal service of process.

That this is true under the English Act is apparent from the fact that the respondent can now by counter-claim accomplish all that he could by cross-libel, and that a respondent who has counter-claimed is entitled to a stay under the rule.

"The Charkieh," L. R. 4 A. & E. 120.
"The Newbattle," L. R. 10 P. D. 33.
"The Rougemont," [1893] L. R. P. D. 275.

The difficulties of the old practice were threefold: —

First, there was the difficulty of granting affirmative relief to a respondent. This was surmounted by the filing of a cross-libel in the same cause.

Second, the cross-libel was of no avail without legal service, and this in many cases was impossible. This difficulty was partially removed by the doctrine of substituted service.

Third, there was the injustice to the respondent in his want of security. This defect among other things was cured by Section 34.

Now, obviously, the counter-claim of the Jurisdiction Act is designed to deal with the first two only of these difficulties, applying as it does to law and equity as well as to admiralty.

It was never intended to obtain security for a respondent in admiralty; and if, before its passage, service was a condition precedent to a stay, it must be so now, and Section 34 would not be applicable in a case of counter-claim, since no service may be had therein.

The rule itself makes no express condition to the right to a stay, except that the counter-claim shall arise out of the same cause of action and that there shall be a cross-libel filed.

There is no sound reason for implying any other conditions. As was said by Sir Robert Phillimore in "The Charkieh," *ubi supra*, "The Court ought not to be astute to find other than a liberal meaning for the section of a remedial statute."

It may be, as was said by Brown, J., in "The Electron," 48 Fed. Rep. 669, that, if the counter-claim was for a cause of action that was not within the jurisdiction of the court, the court might decline to stay proceedings.

Such a rule would not be unreasonable, as the court might well decline to stay proceedings for the sake of a cross cause over which the court had no jurisdiction, and over which the plaintiff in the original cause could not by appearing give the court jurisdiction; but, even if it be conceded that the court has not jurisdiction over a State or government bringing a suit, that should be no reason for reading into Rule 53 any conditions not expressed or provided for therein, since the defect of jurisdiction in such case would be cured by an appearance.

In this country, while it was held in "The Bristol," 4 Ben. 55, that a stay would not be granted on the cross-libel *in rem* without a seizure of the *res*, it was not intimated that service was required in the case of a cross-libel *in personam;* and in "The Toledo," Brown's Adm. 445, a stay was granted on a cross-libel *in rem*, although no process was taken out, which accords with the English doctrine, and is more in consonance with the general trend of decisions both in this country and in England.

Both the rule and the act are designed not only to obtain security for the cross-libellant, but to give the court jurisdiction over the libellant in the original cause.

Of course it may be said that jurisdiction over the original libellant was secured by the doctrine of service upon his proctor, that a stay of proceedings was not needed for that purpose, but only to obtain security, and that, therefore, jurisdiction must be acquired before the rule is applicable.

If it were not true that service of process in a cross cause on the proctors of the libellant in the original cause gives the court jurisdiction over him, this argument would fall to the ground.

But assuming that jurisdiction may be so acquired, and the appellant's contention is that it may, there would be no way of securing a stay on a cross-libel *in rem* nor on a cross-libel *in personam* against any sovereign or government unless, by coming into court as a suitor, it subjects itself to all the processes and orders of the Court that might issue in the case of a private suitor on the principle of such cases as "The Siren" and "The Davis," *ubi supra*. The appellant contends that this is the case. But of course the appellee contends that the contrary is true; and, taking that view for the purpose of this discussion, the result would be as indicated.

It will not do to say that a cross action *in rem* is not allowable and not contemplated by Section 34 and Rule 53. It is true that in most of the cases where a cross-libellant would desire to arrest the vessel of the original libellant as security for his damages, he can accomplish the same purpose by substituted service of process under a cross-libel *in personam* and a stay of proceedings. But it cannot be successfully contended that the act or the rule took away from respondents the right they had always before enjoyed of filing a cross-libel *in rem*. Moreover, the English act by its language plainly contemplates a cross action *in rem*; and if the language of Rule 53 is less clear on this point, and if it was determined

in "The Bristol" that a stay of proceedings could not be had on a cross-libel *in rem* where there was no arrest of the *res*, the contrary was determined in "The Toledo," which is more in consonance with the subsequent trend of decision on the rule. Nor can the suggestion that the construction placed by the learned judge of the court below on Rule 53 would leave a respondent who desired to file a cross-libel *in personam* without the power to do so, where the original libellant is a sovereign or state, be passed over with the suggestion that such a result is unfortunate for the respondent, but nevertheless true.

The truth is that the remedy of substituted service was found to be inadequate in cases of cross-libels *in rem*, and there was perhaps a doubt of its adequacy in cases of cross-libels *in personam* against a sovereign or state. The remedy afforded by the act and the rule was cumulative. It not only provided for security to the cross-libellant, but it also was intended to secure and did secure jurisdiction over the libellants in the original cause in all cases.

Thus in "The Newbattle," *ubi supra*, Butt, J., said that "the legislature has thought fit to provide that when for some reason the ship of the plaintiff cannot be arrested by the counter-claimant, security shall be given by the former. . . . The *Louise Marie* cannot be arrested." She could not be arrested because she was a public ship of the king of the Belgians, and so the court granted a stay under Section 34 of the act.

See also "The Charkieh," *ubi supra*

In fact, the cross-libel has by the operation of Section 34 and Rule 53 become nothing more than a pleading, like in all respects to a declaration in set-off, the only office of which is to enable the court to give affirmative relief to a defendant.

c. POWER OF THE COURT TO ENACT RULE 53, IF SO CONSTRUED.

The old difficulties cured by the doctrine of cross-libels and substituted service might certainly have equally well been remedied by the legislature, as the English Parliament has done, by a law of counter-claim in which all cross actions and service are dispensed with.

As was said by Chief Justice Holmes in Aldrich *v*. Blatchford, 175 Mass. 369, 372, "If a State law provided that in all cases all cross-demands should be open, an entirely possible piece of legislation, no one would doubt the constitutionality of the law." It is difficult to see why this court or any other court of competent jurisdiction could not, while recognizing the necessity of the cross action, make it effective by staying proceedings until the libellant in the cross action appeared therein.

Courts of equity have always acquired jurisdiction of a foreign plaintiff in the case of a cross-bill, by service on his solicitors; and so for that purpose there has been no necessity for staying proceedings in the original cause.

Courts of equity, however, have always had the power to stay proceedings until a foreign plaintiff, if a state or sovereign or corporation, put forward some person who could be made a party to the bill for the sake of discovery.

Prioleau v. *United States*, L. R. 2 Eq. 659.
Republic of Costa Rica v. *Erlanger*, L. R. 1 Ch. D. 171.
United States v. *Wagner*, L. R. 2 Ch. 582.
Republic of Peru v. *Weguelin*, L. R. 20 Eq. 140.
Republic of Liberia v. *Roye*, L. R. 1 App. Cas. 139.

And courts generally have always had the power in a like

manner to compel security for costs from foreign plaintiffs, whether sovereigns, governments, or individuals.

Nylander v. *Barnes*, 6 H. & N. 509.
"The Franz et Elize," Lush. 377.
"The Zufall," 44 L. J. Adm. (N. S.) 16.
Crispin v. *Doglioni*, 1 Sw. & Tr. 522.
Tambisco v. *Pacifico*, 7 Ex. 816.
Drummond v. *Tillinghist*, 16 Q. B. 740.
"The Amazon," 36 L. J. Adm. (N. S.) 4.
"The Beatrice," 36 L. J. Adm. (N. S.) 10
Emperor of Brazil v. *Robinson*, 5 Dowl. 522.
King of Greece v. *Wright*, 6 Dowl. 12.

So, also, it has been held that in a suit by the United States against a contractor and his sureties the court had power to stay the suit until the United States had submitted to the jurisdiction of the court in a suit in equity brought by the sureties to marshall the claims against them.

United States v. *Am. Surety Co.*, 110 Fed. Rep. (C. C. D. Me. 1901) 913.

Moreover, it does not seem to have been doubted by anyone that this court had the power to enact a rule providing for a stay of proceedings to obtain security for damages recovered on a cross-libel at least after service of process thereunder.

It is not perceived what difference service or the want of service can make in this respect.

Aldrich v. *Blatchford, ubi supra.*

d. Effect of Service in this Case.

If the foregoing reasoning be sound, the service of process was a mere nullity. It may be conceded for the sake of argument that no service could give jurisdiction over the

appellee. But none was needed. The service may be treated as if never made, and as if the case stood on the filing of the cross-libel alone. That portion of the decree of the District Court which quashed the service would not, if this view of the case be correct, be objectionable, and might stand. The appellant would then be in the position of a respondent who had filed a cross-libel, and so within the purview of the rule and entitled to a stay.

e. MERE FILING OF A CROSS-LIBEL NOT A SUIT AGAINST THE UNITED STATES.

It may be contended that the mere filing of the cross-libel is within the prohibition of the doctrine of the government's immunity from suit. This contention must be without weight.

Whatever the reason upon which the doctrine is based, it must be clear that the result to be avoided is that the government should be impleaded in any proceeding; that it should be put in a position where, if it did not defend itself, a valid judgment or decree might be rendered against it; that, in other words, it should be made a party to a legal proceeding against its consent or against its will. The mere filing of the libel in this case could have no such result, for, until process issues under the libel and is legally served, the court acquires no jurisdiction over the respondent; he is not a party in the proceeding; he is not placed in a position where, if he does not defend himself, a judgment or decree may be legally rendered against him; he is not, in fact, impleaded.

The reason upon which the doctrine of government immunity from suit rests was stated by Mr. Justice Gray, when chief justice of the Supreme Court of Massachusetts, in Briggs *v.* Life-boats, 11 Allen, 157, at page 162, as follows: "In the older books, this is often put upon the technical ground that, all judicial writs being in the name of the king

as the fountain of justice, the king cannot by his own writ command himself. But the broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury."

In *United States* v. *Lee*, 106 U. S. 196, Mr. Justice Miller said that it seemed most probable that the doctrine had "been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts."

It is obvious that the mere filing of a cross-libel is not open to any of the foregoing objections, and is not within the scope of the doctrine as illustrated by the reasons upon which it rests.

The appearance of the United States in the cross-libel under the compulsion of a stay of proceedings in the original libel would not be making the United States defendants in litigation without their consent. See

United States v. *American Surety Co., ubi supra.*

f. RESULTS.

The appellant therefore submits that acquiring jurisdiction of the original libellant is not a condition precedent to the respondent's right to a stay on filing a cross-libel; that the respondent is entitled to such stay upon the mere filing of his cross-libel; that the service of process, if intended to be anything more than notice of an intention to claim a stay under Rule 53, was superfluous and may be disregarded;

that the appellant is within the scope of the rule and would be entitled to a stay.

In answer to the third question the court below erred. The answer certified to this court must be that the United States was bound under Rule 53 to appear and submit itself to the jurisdiction of the court under the cross-libel, whether before or after the service of process on its proctor, and that in default of such appearance the District Court had the power to stay proceedings under the original libel, and the court erred in holding to the contrary.

II.

If it is true that acquiring jurisdiction of the libellant in the original cause is not a condition precedent to the right to a stay, it does not follow that a stay could not be granted in this case, even though the mere filing of the cross-libel were so far a suit against the United States that the appellee was entitled to have it dismissed. The respondent has filed his cross-libel, and so is within the terms of the rule.

As has already been shown in this brief, and for the reasons stated, the only conditions to a right to a stay under Rule 53 are that a cross-libel shall be filed, that the counter-claim for which it is filed shall be for the same cause of action as that for which the original libel was filed, and possibly that the court has jurisdiction of the subject-matter of the cross-libel. There is no reason for implying any other conditions, and in the case of a remedial rule any such course would be improper and erroneous.

The appellant by his answer and cross-libel has shown that he relies on a counter-claim; and having filed a cross-libel for a cause of action which is the same for which the original libel was filed, and having a subject-matter over which the court has jurisdiction, it is not perceived why he is not entitled to a stay.

It may be suggested that, if this reason be sound, a stay might be granted even, if a libel was dismissed as a suit against the government.

Such a result would seem to the appellant proper, inasmuch as the government's resulting inability to prosecute its suit would arise from its own action in having the cross-libel dismissed.

Such a contingency, however, would be very unlikely to happen, as the rule provides for a peremptory stay on the mere filing of the libel.

It may be suggested, however, that, as a matter of practice, the stay is usually granted on motion; and that, if the government moved to dismiss before the cross-libellant moved for a stay, the suggested contingency might easily arise. To this suggestion the same answer as above may be made; but, as a matter of fact, the contingency has not arisen in this case. It is true there was no motion for a stay; but the cross-libel contained a prayer for a stay, which of course preceded in time the motion of the appellee's attorney, and on the hearing of the latter motion the court treated the matter as if an application for a stay were then before it, and considered the question whether it had power to grant such a stay.

See the questions of jurisdiction certified. Record, pp. 3 & 4, and the opinion of the court, Record, pp. 15, 16, & 17. Even if, therefore, the dismissal of the cross-libel before an application for a stay is heard puts an end to the right to a stay, that is not the situation in the case at bar.

III.

Even if the right to a stay of proceedings in the original libel is dependent upon acquiring jurisdiction over the original libellant by the legal service of process upon him, still the District Court had power to grant a stay under the cir-

cumstances of this case, inasmuch as by the service of the process, as shown in the record, jurisdiction was acquired over the appellee.

A cross suit, as that term is understood in equity and in the admiralty,— that is, a proceeding in the original suit,— was, of course, unknown to the common law, where the defendant's only means of obtaining affirmative relief was to institute a separate and independent action.

The same difficulties of service in the case of foreign plaintiffs arose in such separate and independent actions as arose originally in equity and in the admiralty; but the cross suit at law, being an independent action, the court had no control over the original action.

Accordingly, statutes have dealt with the matter. For instance, it is provided in the Public Statutes of Massachusetts, Chapter 164, Section 2, that, when a person who is not a resident of the Commonwealth and cannot be found there to be served with process, brings an action, he shall be held to answer to any action that may be brought against him by the defendant if the demands in the two cases are of such a nature that the judgments or executions can be set off against each other; and in Section 4 it is provided that the writ in the cross action may be served on the person who appears as the attorney of the plaintiff in the original suit. Such provisions are entirely within the power of legislatures, as was pointed out by the court in the case of *Aldrich* v. *Blatchford, ubi supra.*

In equity it is well established that in case of a foreign plaintiff the court may acquire jurisdiction of such plaintiff in the case of a cross-bill against him by the service of process on his attorney.

See *Jones* v. *Andrews*, 10 Wall. 327.
Hitner v. *Suckley*, 2 Wash. C. C. 465.
Eckert v. *Baucrt*, 4 Wash. C. C. 370.
Ward v. *Seabring*, 4 Wash. C. C. 472.

Kamm v. *Stark*, 1 Sawy. 547.
Lowenstein v. *Glidewell*, 5 Dill. 325.
Sawyer v. *Gill*, 3 Woodb. and M. 97.
Segee v. *Thomas*, 3 Blatchf. 11.
Cortes Co. v. *Thannhauser*, C. C. Southern Dist. N. Y., 1881, 9 Fed. Rep. 226.
Crellin v. *Ely*, C. C. Dist. California, 1882, 13 Fed. Rep. 420.
Greggory v. *Pike*, C. C. Dist. Mass., 1886, 29 Fed. Rep. 588.
Johnson R.R. Signal Co. v. *Union Switch & Signal Co.*, C. C. Western Dist. Pa., 1890, 43 Fed. Rep. 331.
Hobhouse v. *Courtenay*, 12 Sim. 140.
Hope v. *Hope*, 4 De Gex, M. & G. 328.

The same doctrine prevails in the admiralty.

"The Eliza Lines," C. C. Dist. Mass., 1894, 61 Fed. Rep. 308, 322.

It may be argued that the above citations depend upon the doctrine of agency,— namely, that the attorney of a foreign plaintiff, being appointed by him to conduct the litigation, must be deemed to have authority from the plaintiff to receive service, just as the plaintiff would be served if personally within the jurisdiction; and that, if the plaintiff himself could not be served with process, *a fortiori* his attorney could not.

If the rule of the above cases rested exclusively on the doctrine of agency, it must follow that, wherever a foreign plaintiff expressly limited his attorney's authority and expressly withheld power to receive service from the attorney, substituted service would be of no value; but it has never yet been determined that a foreign plaintiff by such action could avoid the jurisdiction of the court in the case of a cross-bill or a cross-libel.

The real ground upon which these cases rest, therefore, must be, as was indicated in "The Eliza Lines," that of implied agreement. As was said by the court in that case, "The original promoter of the litigation, by coming into court, submits himself, by implied agreement, to service made in that manner, and, by consequent implication, vests his solicitors or proctors with authority to receive the service of the precept issued on the cross demand."

It is conceived that whoever comes into a court of equity or admiralty as a suitor thereby submits himself to the usual practice and orders of the court. A cross-bill or a cross-libel and the service of process thereunder are a part of the practice of every court of equity or admiralty. If the plaintiff is within the jurisdiction, there is no need for implying any agreement, because he may be served with process, whether he wishes it or not; but, where the plaintiff is without the jurisdiction, the doctrine is needed and is applied, that by implication he agrees, by coming into court as a suitor, that a cross-bill or a cross-libel may be filed against him and served on his attorney.

If this is sound, there is no reason why it should not be applied in the case of a government. There is no reason why a government should stand any better as a plaintiff or libellant than any other plaintiff or libellant. There is no reason why a government should be relieved of the burdens or conditions resting upon a party who institutes litigation. None of the reasons upon which the doctrine of government immunity from suit rests apply to such a case, as the government will always avoid any of the difficulties suggested in those reasons by refraining from instituting legal proceedings; and, if such legal proceedings are essential, it is not unreasonable or unjust, but, on the contrary, highly desirable that they should be undertaken and carried on under exactly the same conditions as attend the conduct of litigation by private persons.

In short, wherever a plaintiff, whether it be the government or an individual in equity or a libellant in admiralty, is by reason of his residence or his character beyond the reach of process, nevertheless by coming into court as a suitor he subjects himself for all the purposes of the case to the jurisdiction of the court; and, if the practice of the court requires service of process as a condition to the exercise of its jurisdiction, the plaintiff or libellant is conclusively presumed to have consented to the service of process either on the plaintiff or libellant direct or on the attorney or proctor in the cause.

Nor are precedents wanting for such a doctrine.

It has long been held in England that where a foreign sovereign brought suit in the English Chancery a cross-bill might be filed against him and service made on his solicitor.

Hallet v. *King of Spain*, 2 Bligh (N. S.), 31.
Prioleau v. *The United States*, L. R. 2 Eq. 659.
Republic of Costa Rica v. *Erlanger*, L. R. 1 Ch. D. 171.
United States v. *Wagner*, L. R. 2 Ch. 582.
Republic of Peru v. *Weguelin*, L. R. 20 Eq. 140.
Republic of Liberia v. *Roye*, L. R. 1 App. Cas. 139.

And the same rule was in force where the British government was a suitor in the Court of Chancery.

Attorney-general v. *Brooksbank*, 1 Y. & J. 439, 443.

In *King of Spain* v. *Hallet*, *ubi supra*, which was a suit in equity in which the defendant filed a cross-bill against the King of Spain, the Lord Chancellor said at page 57, "If he" (a foreign sovereign) "appears as plaintiff, you can do complete justice — you can impose any terms you think proper — you have them in your power — you may file a cross-bill, and then you have him completely under your control and jurisdiction."

See to the same effect the same case when again before the Lords, 1 Cl. & F. 333, where it was held that the king must personally, on oath, answer the cross-bill, although it alleged fraud.

In *Rothschild* v. *Queen of Portugal*, 3 Y. & C. 594, where the Portuguese government, having deposited certain bonds with the plaintiffs as security for loans made by them with authority to sell, the proceeds to be credited on the account, and where a sale had been made by the plaintiffs and the proceeds credited, the Portuguese government objected to certain items of interest and brought suit for them at law on the ground of overcharge, and this suit was brought to obtain discovery from the Queen of Portugal and for an injunction to restrain the action at law, the court held on demurrer that the queen, "bringing suit voluntarily in a court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of this court of equity."

In "The Newbattle," L. R. 10 P. D. 33, Brett, M. R., said, "If a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him." In the same case, Cotton, L. J., said: "When a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. . . . It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security."

In "The Siren," 7 Wall. 152, Field, J., said: "When the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with

reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

Again: "Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private citizens."

In *Carr* v. *The United States*, 98 U. S. 433, at page 438, it is said: "The cases like that of the Siren and the Davis, already referred to, and many others therein cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected."

Mr. Justice Miller in *Case* v. *Terell*, 11 Wall. 199, 201, and Mr. Justice Gray in *United States* v. *Lee*, 106 U. S. 196, 248, asserted the principle upon which "The Siren" and "The Davis" were based to be that "the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."

In "The Davis," 10 Wall. 15, already referred to, it was held that a libel for salvage against a cargo of cotton delivered by the treasury agent of the United States to the master of "The Davis" for shipment might be maintained, the cotton not having been taken out of the possession of the United States, but out of that of the master of the ship. The court says, "The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton."

In *Cunningham* v. *R.R. Co.*, 109 U. S. 446, at page 452, it is said, "And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court."

In *Clark* v. *Barnard*, 108 U. S. 436, at page 448, it is said: — "In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title."

In *Workmen* v. *New York City, Mayor, etc.*, 179 U. S. 552, at page 587, it is said by Mr. Justice Gray, delivering the dissenting opinion of himself and Justices Brewer, Shiras, and Peckham, that "in *The Siren*, a claim against a prize ship for damages from a collision with her while in the possession of the prize crew was sustained against the proceeds of the sale after condemnation, solely because the United States were the actors in the suit to have her condemned. So in *The Davis*, salvage against goods belonging to the United States, and part of the cargo of a private ship, was allowed because the possession of her master was not the possession of the United States, and the United States could only obtain the goods by claiming them in court."

In *United States* v. *Wilder*, 3 Sum. 308, the owners of a vessel on which goods belonging to the United States had been shipped, the ship having gone ashore and the cargo having been saved at much expense, held the goods of the

government, demanding the government agent's signature to a general average bond. The government refused, and brought suit for the detention of the goods. The court held that the owners of the ship had a lien on the property for general average expenses, and were entitled to retain the goods.

In 600 Tons of Iron Ore, District Court, District of New Jersey (1881), 9 Fed. Rep. 595, at page 600, it is said, "It will not be suggested, after the case of *The Siren*, 7 Wall. 152, that the government stands in any different relation to the money in the registry than do private suitors, except that it is exempt from the payment of costs."

In *Carlisle* v. *Cooper*, Circuit Court of Appeals, 2d Circuit (1894), 64 Fed. Rep. 472, at page 474, it is said, "When, however, the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendants of set-offs, legal and equitable, to the extent of the demand made or property claimed, and stand, with reference to the rights of the defendants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."

In *North American Commercial Co.* v *United States*, Circuit Court of Appeals, 9th Circuit (1897), 81 Fed. Rep. 748, where on a libel of the United States a decree of condemnation had been passed against a ship for violating the law against killing fur seals, and the ship had been sold and the proceeds paid into court, it was held that a libel of intervention in behalf of persons who had furnished supplies prior to the illegal act might be maintained.

In the case of *In re* White Star Towing Co., District Court Southern District, Georgia (1898), 91 Fed. Rep. 285, it was intimated that after the vessel had been condemned as prize on the libel of the United States, but before sale, the court

would entertain an intervention in behalf of a person who had rendered salvage services to the vessel.

See also *United States* v. *American Surety Co.*, 110 Fed. Rep. (C. C. D. Me., 1901) 913.

In *United States* v. *Mackoy*, 2 Dillon, 299, it was held that, where distillery property had been sold under condemnation proceedings instituted by the United States and the proceeds had been paid into court, the court would entertain an intervention in behalf of mechanics, and judgment creditors who had a lien on the property before the forfeiture.

In *M'Candlish* v. *Commonwealth*, 76 Va. 1002, where certain vessels with cargoes of oysters thereon were seized for violation of the State oyster law, and the oysters were sold and the proceeds paid into court, it was held that the court would entertain a petition for payment to him of the proceeds by an attorney to whom the captains of the vessels directed the proceeds of the sale to be paid for legal services. The court said at page 1005: "The mistake of the attorney-general is in assuming that the petition was a suit against the Commonwealth. The State was the original actor in the matter. She it was that instituted the proceedings, and through her officers seized and held possession of the property in dispute. She failed to make good her claim, and the application in the same proceedings was to restore to the defendants, the owners or their assignee, the property which she had seized and to which they were entitled. The demand was in the nature of a counter-claim, and not a direct original suit against the State." Citing "The Siren."

See also

Commonwealth v. *Mister*, 79 Va. 5.

In the *Union Pacific R.R. Co.* v. *United States*, 2 Wy. 170, which was an action of replevin by the United States to

recover certain government property retained by the railroad under its lien for carriage, the court, at page 191, said: "The exemption is personal, and the will to retain is a will to waive it, in the exercise of sovereign interests. When it does waive the privilege invoking the jurisdiction of the court, it submits to that jurisdiction; presenting a claim for its adjudication, it asks that the claim be adjudicated upon its merits — and allowed or rejected accordingly." Again, "At common law, however, a suit by the government subjects its claim to any defence founded upon a defect in the claim itself; such a defence inheres in the suit, the power to sue confers the right of defence, and invokes the full jurisdiction of the Court to both sides for the purpose of disposing of it according to its merits." Again: "It is a suit *in rem*. The Supreme Court of the United States applies this rule to all proceedings *in rem* instituted by the Federal government, namely: that the institution of the proceeding is a waiver of its exemption from suit either against itself or its property, and opens the subject matter of the proceeding to all opposing demands, standing toward defendants and claimants precisely like a private suitor, except as to costs and affirmative relief beyond the thing in controversy; the theory of which rule is that the government asks for, and can obtain, only what belongs to it out of the property. Upon this rule, that Court disposed of the cases of the *St. Jago de Cuba, United States v. Wilder, The Siren and Davis.*" The government having in accordance with the usual practice in replevin cases given a bond to respond in damages and costs, the court rendered a judgment against it for $588.16 with costs, saying: "Under the distinction above explained, and by which the record would be construed, a judgment for the defendant, in suit of replevin, brought upon this Statute, would, were the plaintiff a private person, be a general and personal judgment, also a judgment specifically against the undertaking; but, the plaintiff being the government, it would be a judgment only against

the undertaking, and though we direct such a judgment to be in form entered, we do not mean to say that it would not suffice to limit it in form to one against the surety, for whatever its form, whether entered against the government and surety, or against the latter only, it would in effect be a judgment against the surety alone. At the common law the judgment would not embrace costs, but the government, by instituting the suit, and furnishing the requisite security, elected to provide a fund for the costs, and to accept an adverse judgment charging that fund with the costs; it is therefore consistent to embrace the costs in the judgment."

The above citations are careful to guard against a judgment for affirmative relief or for costs against the government, but this is undoubtedly because of the fact that such judgments or decrees could not be enforced. Where the government has provided a security for such judgments and costs, as it must provide in this case if a stay is granted or else cease to prosecute its own case, there is no objection to a judgment either for affirmative relief or for costs, as was expressly adjudged in the case of the *Union Pacific R.R. Co.* v. *United States*, which is directly in point.

The doctrine of set-off referred to by Mr. Justice Field in "The Siren" is instructive.

There was no right of set-off at the common law.

United States v. *Eckford*, 6 Wall. 484.
Watkins v. *United States*, 9 Wall. 759.

Congress has never passed any law giving a general right of set-off in the Federal courts in Federal cases; but there have been several special acts, among others Chapter 20 of the Acts of 1797 (1 Stats. 512). The latter act gave a right of set-off in suits brought by the United States, but did not provide for a judgment in favor of the defendant in case a balance was found due from the United States.

See

United States v. *Eckford*, 6 Wall. 484.
Watkins v. *United States*, 9 Wall. 759.
United States v. *Thompson*, 98 U. S. 486.
Schaumburg v. *United States*, 103 U. S. 667.

In the Federal courts, where a set-off has been claimed against the United States under State laws, as would be the case where the jurisdiction of the Federal courts did not arise out of the nature of the question involved, no judgment for a balance against the United States could be enforced; and this would be a sufficient reason for refusing to take cognizance of such a set-off.

Reeside v. *Walker*, 11 How. 272.

It has not perhaps been decided that the court would not take cognizance of such a set-off to the extent of the claim in the original cause.

It seems to have been thought by the court in "The Siren" that claims against the United States might be set-off independently of the Statute, at least to the extent of the plaintiff's claim.

See also

United States v. *Ringgold*, 8 Peters, 150.
United States v. *McDaniel*, 7 Peters, 1.
United States v. *American Surety Co.*, 110 Fed. Rep. 913.

A set-off is really a suit against the plaintiff, and to take cognizance of it to the extent of the plaintiff's claim is really giving affirmative relief to the defendant to that extent.

If the view of the court in "The Siren" is correct, and Congress were to pass a general law of set-off, it would follow that the United States would be bound by that law, at least to the extent of its own claim; and it is difficult to see

how the case would be different if Congress provided for the service of process in the set-off.

The line of distinction becomes very thin. It is probable that what the court meant in "The Siren," in saying that the government was exempt from costs and relief, was that execution for costs, or the enforcement of relief, could not be had against the government. The court would very probably reach a different conclusion if a balance due the defendant could be collected without a direct process against government property, as it can in the case at bar by proceeding against the sureties on the bond to be furnished by the government, and as was the case in *Railroad Co.* v. *United States*, 2 Wy. 170, where a judgment for relief was rendered against the United States.

In conclusion on this point, it is submitted that, whenever the United States comes as a suitor into a court of admiralty, they are conclusively presumed to have consented that the court shall deal with the whole case, including not only the claims of the United States against the respondent, but the claims of the respondent against the United States arising out of the same cause of action; that, if the practice of the admiralty requires suit against the United States for the purpose of adjusting claims of the respondent against them, the United States are conclusively presumed to have consented to be sued.

It is not forgotten that Congress alone can give the consent necessary to subject the government to suit; but, if it be the rule of law that the United States, like any other suitor who institutes legal proceedings, must do so under the same conditions and subject itself to cross-suits, the United States must be taken to know the law, and from such knowledge its consent to such suits may be properly presumed.

"The Nuestra Senora de Regla," 108 U. S. 92.

United States v. *American Surety Co.*, 110 Fed. Rep. 913.

Service in such cross-suit, in accordance with ordinary equity and admiralty practice, must be upon the solicitor or proctor in the original cause.

The first, second, fourth, and fifth questions, therefore, certified to this court, by the court below, must be answered in the affirmative.

CONVERS & KIRLIN,
CARVER & BLODGETT,
G. PHILIP WARDNER,

Proctors for Libellant.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 247.

F. S. BOWKER,

MANAGING OWNER OF THE SCHOONER "WILLIAM H. DAVENPORT,"

v.

THE UNITED STATES,

OWNER OF THE LIGHTHOUSE TENDER "AZALEA."

SUPPLEMENTAL BRIEF.

This is an appeal from a decision of the District Court for the District of New Jersey dismissing a cross libel filed by the appellant against the United States.

The case comes to this court under section 5 of the Act of March 3, 1891, 26 Stat. 826, providing "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is suggested that the decree appealed from in this case is not a final decree, and the appellee relies on the case of

Ayres v. *Carver*, 17 Howard, 591.

In that case it was held that a decree dismissing a cross bill in equity praying for relief against co-defendants on the

ground that the relief sought for could not be granted upon a cross bill was not a final decree, and therefore could not be taken by appeal from the District Court of the United States to this court under the twenty-second section of the Judiciary Act of 1789.

This decision was followed in the case of

Ex parte The S. & N. Alabama R.R. Co., 95 U. S. 221.

In regard to these decisions it is to be said,—

First. That they have not been followed in other jurisdictions.

In

Clutton v. *Clutton*, 106 Mich. 690,

it is said, referring to *Ayres* v. *Carver*, that "a better rule is that a cross bill is so far an independent suit as to authorize an appeal from a decree, dismissing it on demurrer before the final disposition of the original bill."

See also

Brooks v. *Woods*, 40 Ala. 538.
Lehman v. *Fore*, 47 Ala. 733.
1 Beech Mod. Eq. Pr. 446.

Second. The rule announced is to be confined to the exact situation presented by the facts, for this court has decided that in some cases — *e.g.*, where the substantial effect of a decree upon a cross bill is a complete determination of the cause — an appeal will lie.

Holgate v. *Eaton*, 116 U. S. 33.
Blythe v. *Hinckley*, 84 F. R. 228, 236 (C. C. N. D. Cal. 1897).

Third. *Ayres* v. *Carver* is clearly distinguishable from the case at bar: —

(*a*) The twenty-second section of the Judiciary Act of 1789

(1 Stat. 84) under which the appeal was taken in *Ayres* v. *Carver* provides for the revision in the Supreme Court of *final* judgments and decrees in civil actions and suits in equity in a Circuit Court. (The suit in *Ayres* v. *Carver* was brought in the District Court for the Northern District of Mississippi, but that court by law had Circuit Court jurisdiction. See Rev. St., sect. 571). But under Section 5 of the Court of Appeals Act above quoted no specific mention is made of final decrees or judgments.

(*b*) In *Ayres* v. *Carver* the decree was plainly not a final decree, because there was nothing to prevent the plaintiff in the cross bill from bringing an original independent bill in equity or an action at law. In the present case, on the other hand, the decree appealed from is a final and affirmative denial to the appellant of all affirmative relief.

(*c*) A cross bill is wholly different from a cross libel. As was said by Mr. Justice Nelson, delivering the opinion of the court in *Ayres* v. *Carver*, the cross bill "should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross bill is auxiliary to the proceeding in the original suit and a dependency upon it.

"It is said by Lord Hardwicke that both the original and the cross bill constitute but one suit so intimately are they connected together." And accordingly the court held in that case that a decree, whether maintaining or dismissing a cross bill, disposes of a proceeding simply incidental to the principal matter in litigation. On the other hand, in regard to a cross libel, it was said by Mr. Justice Clifford, delivering the opinion of the court in

"The Dove," 91 U. S. 381,

speaking of a libel and a cross libel, "Causes of the kind may be tried together or separately, as it is obvious that the plead-

ings in each are complete without any reference to the other. . . . For all purposes of defence to the charges made by the libellant, his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross libel. . . . Controversies of the kind are usually tried together; and it appears that the two suits in this litigation were so tried in the District Court, and that the District Court came to the conclusion that the cross suit was without merit, . . . but the determination of that suit by such a decree did not determine the rights of the parties in the original suit; on the contrary, it left the issues in the latter suit just as they would have been, had the cross suit never been commenced. . . . Usually such suits are heard together and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross suit adverse to the libellant, even though the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just defence to the charge there made which is regularly set up in the answer."

In equity the dismissal of the original bill usually and generally *ipso facto* disposes of a cross bill in the same cause.

1 Beech Mod. Eq. Pr., sec. 447 and case cited.

On the other hand, inasmuch as in the admiralty a cause and a cross cause, as appears by the decision in

"The Dove," *ubi supra*,

may be tried separately and separate decrees rendered, it follows that the dismissal of the original libel cannot affect the cross libel.

(*d*) A cross bill in equity is so far auxiliary to, dependent on, and a part of the original cause that it would seem that the filing of the cross bill cannot interfere with the right of

the plaintiff in the original cause to dismiss his bill at any time upon payment of costs, thereby also disposing of the cross bill. See

Daniell's Chancery Pleading & Practice,
1st Am. Ed. from 2d Eng. Ed., pp. 927 to 930.

In the admiralty, on the other hand, the cross libel is so far independent of the original cause that, if the dismissal of the original libel would injuriously affect the cross cause, as possibly might be the case where a stay had been granted under the 53d Rule in favor of cross libellant, it is probable that in such a case the original libellant would not be allowed to dismiss his libel upon payment of costs.

As to what is a final decree, it was said by Mr. Chief Justice Waite, delivering the opinion of the court in

St. Louis, Iron Mountain & Southern R.R. Co. v. *Southern Express Co.*, 108 U. S. 24 at p. 28,

"A decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."

See also

Bostwick v. *Brinkerhoff*, 106 U. S. 3.
Grant v. *Phœnix Insurance Co.*, 106 U. S. 429.

The decree in the case at bar has terminated the litigation between the parties on the merits of the case; to wit, the case in which the right of the appellant to affirmative relief was decided.

The appellant further calls attention to the following decisions: —

A decree upon an intervening petition in a bill in equity to foreclose a mortgage in which a receiver had been appointed

awarding damages in favor of the intervenor on account of the death of her husband occasioned by the negligence of the receivers and their agents is a final decree.

Rouse v. *Letcher*, 156 U. S. 147.

So where, in a suit to foreclose a mortgage in which receivers have been appointed, a person intervenes claiming a prior right to a portion of the mortgaged property, a decree in favor of the intervenor is a final decree.

Central Trust Co. v. *Grant Locomotive Works*, 135 U. S. 207.

Central Trust Co. v. *Marietta & N. G. Ry. Co.*, 48 Fed. Rep. 850 (C. C. A. Fifth Circuit, 1891).

Similarly, where an attachment was levied by the United States marshal in a suit in a federal court, and an intervening petition setting up a prior right under an earlier seizure by a sheriff acting under state process was dismissed, the judgment was held to be final.

Gumbel v. *Pitkin*, 113 U. S. 545.

And, where a creditor's bill against an insolvent railroad was consolidated with a suit to foreclose a mortgage thereon and certain preferred stockholders obtained leave to file or did file an answer in the consolidated suit and a cross bill, it was held that a decree denying the right of said stockholders to intervene was a final decree and appealable.

Hamlin v. *Toledo, St. L. & K. C. R. Co.*, 78 Fed. Rep. 664 (C. C. A. Sixth Circuit, 1897).

So, also, where one who had obtained judgment against a railroad in South Carolina for personal injuries, intervened in a foreclosure suit against said railroad, alleging that under the law of the State the judgment had priority over the mort-

gage, a decree in favor of the intervenor's claim is a final decree.

Central Trust Co. v. *Madden*, 70 Fed. Rep. 451 (C. C. A. 4th Circuit, 1895).

See also

Grant v. *East & West R. Co.*, 50 Fed. Rep. 795 (C. C. A. 5th Circuit, 1892).

Similarly, where a bondholder brought suit in equity to secure the appointment of a receiver, it was held that an order allowing him a certain sum for expenses and counsel fees out of the fund realized by the receiver was a final decree, although the administration of the fund for the benefit of bondholders might continue in court for a longer time, the court saying, "Though incidental to the cause, the inquiry was a collateral one having a distinct and independent character and received a final decision."

Trustees v. *Greenough*, 105 U.S. 527.

See also

Jacksonville T. K. R. R.R. Co. et al. v. *Am. Construction Co. et al.* 57 F. R. 66 (C. C. A. 5th Circuit, 1893).

In

Elliott v. *Sackett*, 108 U. S. 132,

a bill was filed to reform a deed, alleging that in the deed the plaintiff was made to assume an encumbrance which was not according to agreement. The encumbrancer was made a party, and filed a cross bill to foreclose. The Circuit Court dismissed the original bill, adjudging that the plaintiff had assumed the encumbrance, and decreeing that the plaintiff and defendant should pay the debt due the encumbrancer within one day of the entering of the decree, and that, if they

did not, the premises should be sold by a master, and that he report any deficiency, and that, in case the defendant had to pay anything, he could apply to the court for a further order to compel the plaintiff to pay him. This was held to be a final decree.

Furthermore, where several causes of action are joined in one suit, as, for instance, where an action for the recovery of land is joined with one for the recovery of mesne profits, as is ordinarily the case in ejectment, it has been held that a judgment that the plaintiff recover possession and awarding costs on this issue is a final judgment, the court saying, "It cannot affect the finality of a judgment that a cause of action upon which it was rendered was united in the same petition with other causes of action which have not yet been finally adjudicated."

Klever v. *Sewall*, 65 F. R. 373 (C. C. A. 6th Circuit 1894.)

It is conceived that after an original libel is filed a decree upon a petition to limit liability refusing such limitation would be a final decree, and appealable without waiting for further proceedings in the libel.

Compare

Butler v. *Steamship Company*, 130 U. S. 527.

In "The Alert," 61 Fed. Rep. 113 (C. C. A. 2d Circuit, 1894), the ship was libelled for loss of cargo shipped under contract with her charterers. The owners filed a petition alleging that the charterers alone were liable. Thereupon, the latter were made parties and required to file an answer both to the petition and the libel. A decree was entered against the ship for the amount of the loss; but, as the evidence failed to clear up the issues between the charterers and the owners, that part of the cause was retained for further

proceedings. The decree holding the ship liable was nevertheless held to be a final decree and appealable.

In *Forgay* v. *Conrad*, 6 How. 201, at p. 203, Mr. Chief Justice Taney, delivering the opinion of the court, said: "This court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature." Accordingly, inasmuch as, if the appellant had had to wait until the complete disposition of the cause, they would have been subjected to irreparable damage by reason of the sale and disposition of the property in suit, the court held that the appeal would lie.

In *Blossom* v. *M. & C. Ry. Co.*, 1 Wall. 655, Mr. Justice Miller, delivering the opinion of the court, said this court "has never decided that in no case arising after a decree, which is final only in the sense which would allow it to be appealed, will an appeal be allowed from an order of the court, however it might affect important interests or decide matters not before the court when the first decree was rendered. . . . On the contrary, this court has repeatedly considered appeals from the decrees of the Circuit Court upon matters arising after the case had been here."

In *Withenbury & Doyle* v. *United States*, 5 Wall. 819, the government had libelled certain cotton as prize in the District Court for the Southern District of Illinois. There were several of these libels, which were consolidated, and various claims were interposed in the consolidated suits, among which were those of the appellants to 935 bales of cotton. Their claims were dismissed. It was held that this was a final decree and appealable to this court. Mr. Chief Justice Chase, delivering the opinion of the court, said: "It appears from the record that the decree disposed of the whole matter in controversy upon the claim of Withenbury & Doyle. It was final as to them and their rights, and it was final also so far as the

claimants and their rights are concerned as to the United States. It left nothing to be litigated between these parties. It awarded execution in favor of the libellants against the claimants."

In *Handley* v. *Roberts*, 59 Fed. Rep. 836 (C. C. A. 8th Circuit, 1894), it was held that orders finally dismissing interpleaders from the suit, also dismissing an auxiliary petition brought by the plaintiff to enjoin them from enforcing a judgment, and vacating an injunction previously granted thereunder, embody final decisions as to such interpleaders.

If an appeal does not lie in this case, the appellant might in certain contingencies be without remedy. Of course, if at a hearing on the merits the appellant's vessel be found solely in fault, an appeal could be taken, and that appeal would bring up the present question. If the appellate court affirmed the decision of the court below, there would be no occasion to consider the matter of a stay. But, if the ultimate appellate court were of opinion that the government's vessel were solely at fault or that damages should be divided (the appellant's damage being greater than that of the government), the 53d Rule would be powerless to help the appellant, since the government, having obtained the opinion on the merits of the court of last resort, would submit to a stay. That court should hold that the action of the District Court in refusing the stay was erroneous. If, on the other hand, the trial court should find the government's vessel solely at fault, it is difficult to see what there would be for the appellant here to appeal from, as the order here appealed from would be no more final then than it is now. If the trial court divided damages, the appellant would not need to invoke the rule unless his damages were greater than those of the government, including in the reckoning injury to cargo, for which he could recover over. But, if such damages were greater, the appellant would be helpless ; for, if the court of last resort affirmed the decision or found the government's vessel wholly in fault, the government, as already indicated, having

obtained the opinion of the court of last resort on the merits, would submit to a stay if that court should hold the appellant entitled to it.

It being, perhaps, within the discretion of the District Court to refuse a stay, it is, at least, not certain that there would be any remedy by mandamus or prohibition.

CONVERS & KIRLIN,
CARVER & BLODGETT,
G. PHILIP WARDNER,
Proctors for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

F. S. BOWKER, MANAGING OWNER OF THE schooner "William H. Davenport," appellant,
v.
THE UNITED STATES, OWNER OF THE light-house tender "Azalea." } No. 247.

BRIEF FOR APPELLEE.

The question involved in this appeal is not unimportant. While it has been variously stated in the five questions certified by the lower court, yet in its last analysis the question reduces itself to this:

Is the immunity of the United States from suit in an action sounding in tort—an immunity which rests on considerations of public policy, and which this court has said can not be waived except by express consent of Congress—waived by or lost to the Government, if the Government brings an action against the private litigant for whose benefit the waiver is claimed?

Or, stating the question in another form:

Can the defendant in a suit brought in a court of admiralty by the United States secure by medium of a cross bill relief against the Government, which he could not ask through the medium of an original libel?

Stated even more broadly, the underlying question is, whether the Government can avail itself of its unquestioned right to litigate only on condition of forfeiting its immunity from adverse suit.

In the case at bar it is important to observe the precise nature of the cross bill, and the exact relief for which it prayed. The United States had filed a libel against the three-masted schooner *William H. Davenport*, and claimed damages "to the amount of $5,000 for injuries sustained by its light-house tender *Azalea* in a collision with the said schooner *Davenport*." The gravamen of the libel was a wrong done to the United States by the tortious act of the owners of the schooner in question, and the scope of the legal controversy was, under the libel and answer, necessarily limited to the ascertainment of the single fact whether any injury had been sustained by the *Azalea* by reason of the negligence of the owners of the *Davenport*. To no greater extent did the Government submit itself to the judgment of the court.

The owner of the *Davenport*, having intervened as respondent, and filed his answer, in which he charged that the collision was due to the negligence of those in charge of the *Azalea*, filed a cross bill, in which he made "complaint against the United States of America, owner of the steamer known as the light-house tender *Azalea*, in a cause of collision." The cross libel, after proceeding to detail the cross libellant's version of the collision, prayed as follows:

> Wherefore your libelant prays that a citation, according to the course and practice of

this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interests and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner *William H Davenport* by the filing of a libel against said schooner on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross libel, and that this honorable court will give to the cross libelant such other and further relief as in law and justice he may be entitled to receive, this said action being a counterclaim arising from the same cause of action for which the original libel was filed against the said *William H. Davenport.*

The cross libel, therefore, specifies a new and distinct cause of action from that set forth in the original libel, and asks for different relief. It is true that the substance of the answer to the original libel and the cross libel are, in effect, the same as to the facts of the collision, but the causes of action are separate and distinct. There could be a complete answer to the original libel which would not carry with it as a necessary conclusion any liability to respond by the libellant; but the cross libel in this case goes further than a

mere defense to the libel, and introduces into the controversy a new and distinct cause of action, namely, the assertion of the liability of the original libellant to respond in damages to the respondent; and while, as a matter of convenience, these two cases, under Admiralty Rule 53, when brought by private litigants, could be consolidated or tried together, yet the causes of action are separate and distinct. Each case has its peculiar pleadings.

In this new cause of action, therefore, the cross libellant makes four prayers:

(1) That the Government shall respond in damages for the wrong done by its servants in an action sounding in tort.

(2) That a citation be issued to compel the United States "to appear and answer all and singular the matters aforesaid."

(3) That the proceedings instituted by the Government in the original and distinct action shall be stayed "until security be given by said respondent (the United States) to respond for the damages claimed in this cross libel."

(4) The general prayer for further relief.

Has this court jurisdiction to grant these prayers? It certainly has none unless it has in some way submitted itself as a party defendant to an adverse suit. It can not be contended that by its original libel it has thus submitted itself to a separate and distinct cause of action. It did not ask the court to determine the question whether its servants, who were sailing the *Azalea*

had negligently inflicted damage upon the *Davenport*, and it neither expressly nor by any reasonable implication waived the immunity which it enjoys on grounds of public policy, and which under the decisions can not be waived except by the express consent of the legislative department of the Government.

It is suggested, however, that the mere fact that the Government appears in a court and asks for redress for a wrong done it, constitutes a waiver of its immunity from suit by reason of a wrong done by it, and this argument, for which no applicable authority is cited, is based upon Admiralty Rule 53, which provides that:

> Whenever a cross libel is filed upon any counterclaim arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form to respond in damages, as claimed in said cross libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

The answer to this ingenious argument is twofold.

In the first place it is not in the power of a rule of court to deprive the Government of immunity from suit. It can not deny a litigant an undoubted right to litigate in order to compel him to surrender an unquestioned right of immunity.

In the second place, it obvious that the admiralty rule referred to has no application to the present case, for it is obviously intended to permit a cross bill only in cases where an original libel could be properly

filed. In other words, it can only refer to claims which are legally suable in a cross bill, and can have no reference to cases where, by any reason of the policy of the law, an original bill could not be filed. Nothing could be further from the intention of those who framed the rule than the thought that in giving the respondent in a collision case a right to file a cross bill that it was creating some new right of action which otherwise would not exist. *In other words, the rule in question does not create rights, but simply affects procedure, and simply means that where A sues B, and B has a right to sue A, and both causes grow out of a common transaction, that instead of having two separate actions, B may file a cross bill, and require A to give security even as B has been compelled to give security to meet A's claim. But the entire rule is based upon the assumption that B has an existing right to sue A, and can have no application to a case like the one at bar where B (Bowker) has no legal or suable claim against A (the United States).*

To hold otherwise would impair the immunity from prosecution which is said to rest upon important considerations of public policy, for if this admiralty rule can be construed to give a right to sue the Government which did not theretofore exist, then it must be true that in all equity cases, where equity procedure also provides for cross bills, that whenever the Government goes into a court of equity to ask relief, that the respondent can by cross bill compel the United States to grant other and distinct relief in a matter in which otherwise no original bill could possibly lie. And even at common law, statutes in most

of the States regulating civil procedure in the Federal as well as the State courts, provide that in any common-law action to establish a civil liability, where the defense is a set-off, that the jury may give a certificate in favor of the defendant and against the plaintiff for any amount which it finds the plaintiff owes the defendant. If the appellant's contention in the present case be true, therefore, the United States can not go into a common-law court and sue in an action of debt without subjecting itself to a counter claim, arising, perhaps, out of entirely different circumstances, and making possible a judgment in favor of the defendant and against the Government.

Moreover, if the appellant's contention be sound, that the mere filing of the bill by the Government is a waiver of its immunity from suit, it must follow that it is likewise a waiver of its immunity from execution; for if it subjects itself to the ordinary procedure which adjudicates the rights of private litigants in one respect, then it subjects itself to all, and it would then follow, in the present case, that if the Government by suing the owners of the *Davenport* has thus permitted such owners to sue the Government, and obtain a judgment for damages, it has also so far waived immunity from execution as to permit its offending vessel, in this case a light-ship, to be seized by its own officer, the United States marshal, in execution for the payment of the liability thus established. The salutary rule of public law that the sovereign power may not thus be impleaded or embarrassed by judicial process, either original or final, is well vindicated by imagining, in

the present proceeding, the United States, by its own marshal, seizing a governmental instrumentality that is essential to life, and thus impeding the Government in its operations and subjecting it and its citizens to heavy losses.

The appellant, however, suggests that such is not his purpose, and that he neither wishes the service of process upon the Government, which under the theory of the law compromises its dignity as a sovereign power, nor any process in execution of any judgment which he may obtain. This contention, however, which only finds expression in the brief, which is not a matter of record, is entirely opposed to the specific prayers of the libel. The libel prayed for a citation to compel the appearance of the United States in its own courts to answer the allegation of negligence, and it did ask that the court should "pronounce for damages with interest and costs," which could only mean that the court should enter such decree as would enforce its judgment. Appellants now claim that they ask nothing more than a stay of the original proceedings. But their prayer goes much further, for it asks the court "to grant a stay of all further proceedings * * * *until security be given by said respondent* * * * *to respond for the damages claimed in this cross libel.*"

I submit that the same public policy which protects the property of the Government from seizure or even adverse judgment likewise exempts the Government from the necessity of giving security to pay any judg-

ment against it. No practical distinction is perceivable between the two. If the Government can be compelled to give security for the payment of judgments where its property can not be seized in execution, its operations may be materially impeded in meeting this demand.

The suggestion that the Government in filing its libel thereby waives its immunity from a counterclaim is unsound. It is based upon an erroneous construction of Admiralty Rule 53, for while the Government unquestionably in coming into court submits itself in the assertion of its rights to the rules of practice that there prevail, and in this respect stands on no higher plane than any litigant, it does not surrender an unquestioned right, and no rule of court is intended to have this effect.

It must be remembered, in this connection, that not only has Congress not authorized the Government to waive its immunity in the present proceeding, but on the contrary Congress has expressly refused to permit the Government to be sued in actions sounding in tort. The act of March 3, 1887 (24 Stats., 505), waives the Government's immunity, with respect to the following suits against the United States:

> *First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, *in cases not sounding*

> *in tort*, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

It is a strained and remarkable construction of rule 53, that the Government in asking for relief in one cause of action is by a rule of court compelled to give relief in another cause of action, although Congress has not only failed to permit such relief, but by exception practically forbidden it.

The answer to the first question certified by the learned judge must therefore be that while *the United States in filing its libel submitted itself to the jurisdiction of the court in the particular cause of action which was the subject of its libel, but it did not so submit itself as to the distinct cause of action which is the subject of the cross-libel. Similarly, the United States did submit itself "to the ordinary rules and practice in admiralty," and it can claim no higher right in litigating its cause than any private litigant, but the ordinary rules and practice of admiralty do not pretend to authorize, and are not competent to authorize, an action against the United States sounding in tort.*

It seems hardly necessary to cite cases in support of these well-established principles. These principles are summarized and fully stated in the comparatively recent case of *Belknap* v. *Schild* (161 U. S., 16), in which this court, speaking through Mr. Justice Gray, reviewed all of the authorities and summarized the law applicable to the question. (See pages 16 to 22, inclusive.)

It will be noted that the learned justice cites with approval the case of *United States* v. *McLemore* (4 How., 286); *Hill* v. *United States* (9 How., 386), and *Case* v. *Terrell* (11 Wall., 199), in support of the proposition that, "unless expressly permitted by act of Congress, no injunction can be granted against the United States."

This principle has some application in view of the argument of appellant in the case at bar, that they do not ask either original process, or process in execution, but simply for a stay of proceedings until security be entered by the Government to respond to the cross claim.

A stay of proceedings is not distinguishable from an interlocutory injunction. It is, in effect, an injunction. As the term imports, it stays the hand of the Government in the exercise of its right to litigate. If a final injunction does not lie to restrain the United States from doing any act otherwise legal, for equal reasons it can not lie as an interlocutory order to restrain the Government from prosecuting a suit.

It remains but to consider the cases upon which the appellants seem to place some reliance.

The case of *The Siren* (7 Wall., 152), I submit, supports the Government's contention rather than the appellant's. In that case, Mr. Justice Field said:

> It is a familiar doctrine of the common law that the sovereign can not be sued in his own courts without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from

> any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They can not be subjected to legal proceedings, at law or in equity, without their consent, *and whoever institutes such proceedings must bring his case within the authority of some act of Congress.* Such is the language of this court in *United States* v. *Clarke* (8 Pet., 444). The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the Government directly, and suits against its property.

In the *Siren* case the *res* was in court by the express consent, indeed, at the instance of the Government itself, which was seeking to make a legal distribution of the *res*, and the court, in adjudicating the question, necessarily considered all the claims against the *res*. But in the case at bar, the *res*, so far as the cross libel is concerned, is not in court. If the Government had brought the *Azalea* into court, and its proceeds were the subject of distribution, a cross libel would be entirely proper, but the Government

has not brought any property into court, but on the contrary has brought the cross libellant's property into court. The distinction between the two cases may be thus illustrated: By the Government's libel, lawfully instituted, the *Davenport* is lawfully in court. If any private litigant, like seamen, for example, had any claim against the *Davenport*, such claim could be asserted, even though it operated to the reduction of the Government's claim in the *res*, for the Government, having brought the *res* in court, can not exclude any lawful claim against the *res*. But as the Government has not brought the *Azalea* into court, and as the owners of the *Davenport* can not under the rule of public policy bring the *Azalea* into court, it is obvious that no claim against the *Azalea* is legally cognizable.

In the case of *The Davis* (10 Wall., 15), personal property of the United States, but not in the possession of one of its officers, was seized by the marshal under a claim for salvage. The pivotal point of this case was that the seizure took place at a time when the goods in question were in the custody of the master of a vessel, not an employee of the United States, and before they were delivered to the representative of the United States. As this court said (p. 21):

> The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the Government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to

> the agent of the Government. This he had not done when the process was served on the cotton. The marshal served his writ and obtained possession without interfering with that of any officer or agent of the Government.

Under these circumstances it was held that as the *res* had been brought into court without any violation of the Government's immunity from prosecution, that the court could distribute its proceeds among all who were equitably entitled, even though the claim for salvage was adverse to the interests of the Government in the *res*. There is, of course, a vital distinction between that case and the case at bar, where the Government has not brought any of its property within the jurisdiction of the court, and thus subjected its rights to such property to legal adjudication; and therein lies the distinction between the case at bar and all of the cases cited by the learned counsel for appellants. In the latter cases, the Government having voluntarily subjected its property to the judgment of the court, could not complain if the rights of private litigants in said property were thereby judicially recognized. The Davis case, far from modifying the doctrine of *The Siren*, directly affirmed it, as holding—

> that such a lien can not be enforced where, in order to do this successfully, *it is necessary to bring a suit against the United States*, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done.

An act of Congress authorizing an adverse claim against the Government is therefore a *sine qua non* to such claim, and the appellant's contention that the action of the district attorney in bringing the original libel against the *Davenport* is a waiver of the Government's right to be protected against adverse suit is therefore without foundation.

In this connection the case of *Carr* v. *United States* (98 U. S., 433) is instructive. In that case the United States filed a bill in equity to quiet the title to certain real estate in its possession. The defendant set up, by way of estoppel, certain judgments in ejectment which had been rendered in the State courts against the officers of the Government, who were in possession of said real estate as agents of the Government, in whose behalf the United States district attorney appeared. It was further shown that additional counsel in these last-mentioned suits appeared for the officers of the Government at the instance and as the representatives of the Secretary of the Treasury. This court, however, held that the Secretary of the Treasury was without authority to waive the Government's immunity from prosecution.

The court say (p. 438):

> It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary

> of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive those rights. In England it is usual, in the admiralty courts, in proceedings *in rem*, when it is made to appear that property of the Government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the Government to consent in court that it may take jurisdiction of the matter. As stated by this court in *The Davis* (*supra*), "this consent is given by authority of the King, who thus submits to be sued in his own courts. The liberal exercise of this authority (there) removes the difficulty presented here, where no power to do this exists in any officer of the Government, and prevents any apprehension of gross injustice in such cases in England."

In this case the court, moreover, again emphasizes the fact that the cases of *The Siren* and *The Davis* were both predicated upon the fact that the Government had appeared in court as the claimant of certain property, which had been properly brought within the jurisdiction of the court, and as to which, therefore, all claims could be lawfully asserted.

The only case which apparently suggests that anything less than an act of Congress can waive the Government's immunity from prosecution is the peculiar case of *The Nuestra Senora De Regla* (108 U. S., 92). In that case the steamer was owned by a Spanish corporation. She was seized by the United States Army,

but no judicial proceedings were instituted for her condemnation, about the legality of which there seems to have been some doubt. Subsequently her master chartered her to the United States Army, and under this charter she was used as a Government transport. Subsequently she was delivered to the Navy Department and libeled as a prize. The prize court entered a decree directing that the vessel be restored to the owner, but reserved the question of costs and damages. By agreement between counsel for the Government and the owner, proceedings were stayed, "to the end that all question of damage reserved in the decision of the court may be considered and adjusted by the Government of the United States in the application, and with the concurrence of the Government of Spain." Diplomatic negotiations thereupon followed, and, as the result, the Secretary of State expressed a wish that the question of damages for the unlawful seizure of the vessel should be submitted to the court, which subsequently found an award in favor of the owner. On an appeal to this court the contention was urged, for the first time, by the Government, that it could not be proceeded against without the consent of Congress. The case was a peculiar one by reason of the fact that the submission of the case to the court was the result of diplomatic negotiations with a foreign Government, and, therefore, came under the treaty-making power. To have sustained the contention would have been a flagrant breach of good faith with a friendly power. The court was impressed with this circumstance, and

without broadly affirming that the executive department of the Government can waive the immunity of the Government from prosecution without an act of Congress, yet concluded that it was "too late now to insist that the case is not one of prize," and that, under the peculiar circumstances of the case, having regard for its international character, the executive branch of the Government, charged with plenary power over all foreign relations, could agree to submit that which might become a *casus belli* to the decision of our courts. The case is authority for its own peculiar facts, but is not applicable to ordinary litigation.

That *The Nuestra Señora de Regla* is not authority for the proposition that the Executive, in instituting a suit by the Government, can thereby waive immunity from suit is clearly shown in the later case of *Stanley* v. *Schwalby* (162 U. S., 255), in which it appeared that in an action to try the title of lands, and which was brought by private litigants against officers of the Army, that the district attorney, "purporting to act in behalf of the United States, under the instructions of the Attorney-General, appeared and answered," and these instructions were given "by the Attorney-General at the request of the Secretary of War."

This Court, in an opinion by Mr. Justice Gray, held:

> It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any court, without express authority of

Congress. (147 U. S., 512. See also *Belknad* v. *Schild*, 161 U. S., 10.) The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. (*Case* v. *Terrell*, 11 Wall., 199, 202; *Carr* v. *United States*, 98 U. S., 433, 438; *United States* v. *Lee*, 106 U. S., 196, 205.)

* * * * *

The answer actually filed by the district attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney-General, and of any power vested by law in him or in the district attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.

In the present case, therefore, even if the district attorney filed the libel against the *Davenport* under instructions from the Attorney-General, and at the request of the Secretary of the Treasury, yet such fact was not intended to waive, and if so intended was not competent to waive, the exemption of the United States from prosecution by reason of an alleged marine tort inflicted upon the *Davenport* by the Government light-house tender.

Much stress is laid by the appellant upon the case of *United States* v. *American Surety Company* (110 Fed., 913). Apart from the fact that this is but a decision of the circuit court, and, therefore, not binding upon this court, the case, as all the cases cited by the appellant, fails to establish his contention. In that case the United States had sued the surety company on a bond. The surety company filed a bill admitting the claim of the Government on this bond, but suggesting that other claimants had also claims upon the bond, and that the sum thereof was not sufficient to satisfy all of the just claims, and the surety company therefore prayed for an order of court making lawful distribution of the amount of the bond among the parties severally entitled, including the claim of the United States. The circuit court held that it was within its equity powers to stay the action upon the bond until the United States consented to have the same legal question adjudicated in an equity case, where all having any claim upon the liability created by the bond could participate in accordance with equitable principles. The claim, therefore, was not an adverse claim to the Government, nor was any affirmative action asked against the Government. It was purely a question of procedure. The Government had invoked the arm of the court to obtain its rights, and the court recognized the pendency of another cause in which the relief prayed for by the Government could be lawfully obtained, and at the same time the rights of others respected. The stay in this case was, there-

fore, the familiar equity power of the court to prevent a multiplicity of suits, and is not analogous to the present case. A true analogy would exist if the surety company had asked that the Government suit be stayed unless the Government would consent to subject itself to an adverse suit, sounding in tort, by the surety company against the Government.

Appellants also cite, with a show of confidence, the case of the *Union Pacific Railroad Company* v. *United States* (2 Wyoming, 170), in which the highest court of that State held that where the United States had commenced an action of replevin and given its bond, that the court in determining the replevin case, could give judgment against the Government upon its bond. It is not necessary to determine in this case whether that decision was sound, for it is distinguishable from the case at bar by reason of the fact that the Government had given the bond, and under the Court of Claims act was, therefore, liable, and indeed suable, upon its contractual obligation. Congress, therefore, had expressly permitted recovery upon the bond given by the Government, and thereby waived the immunity from suit or from adverse judgment.

It seems hardly necessary to review the various other authorities cited by counsel for the appellant. None of them even remotely sustains appellant's contention. All of them are plainly distinguishable from the case at bar. Appellant himself seems to feel the weakness of his contention, for his real argument, as I understand it, is not that the cross libel was properly

filed, and not that process could be issued against the Government, and not that any adverse judgment could be rendered against the Government on the cross libel, but simply that the court had power to stay the Government's assertion of a legal right until it waived another and distinct right. In other words, the appellant, while apparently conceding that the cross libel is without legal justification, and that the process was properly quashed, yet contends that the court by granting a stay can not merely validate the void proceedings, but can practically grant a perpetual injunction against the Government from exercising its undoubted right to litigate, unless it surrenders a valuable immunity. Such a proposition is as extraordinary as it is novel, and is as mischievous in its possibilities as it is devoid of principle or authority to sustain it.

Respectfully,

JAMES M. BECK,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 247.—October Term, 1901.

F. S. Bowker, Managing Owner of Schooner "William H. Davenport," Appellant, vs. The United States, Owner of the Light-House Tender "Azalea." } In error to the District Court of the United States for the District of New Jersey.

[May 19, 1902.]

The case is stated by the District Court, in substance, as follows: On November 3, 1899, a libel was filed on behalf of the United States in the District Court of the United States for the District of New Jersey against the schooner William H. Davenport, her tackle, apparel and furniture, and against all persons intervening therein, in case of collision, civil and maritime, seeking to recover the sum of $5,000 damages alleged to have been sustained by the light-house tender Azalea in a collision with that schooner on October 2, 1899, off Cornfield Point light-ship in Long Island Sound. It was averred in the libel that the collision was in no way caused by the fault or negligence of those on board the light-house tender Azalea, but that it was solely due to the carelessness and negligence of those in charge of the schooner William H. Davenport in certain particulars stated. The libel concluded with the formal prayer that process might issue in due form of law against the schooner, her tackle, apparel and furniture; that all persons interested might be cited to appear and answer; and that the schooner might be condemned and sold to pay libellant's claim with interest and costs; "and that the court will otherwise right and justice administer in the premises." Process in due form was issued against the schooner, and on November 8, 1899, the marshal filed his return certifying that on November 4 he had made due attachment of the schooner and that the vessel was then in his custody. November 22, 1899, F. S. Bowker, managing owner, filed a claim to the schooner on behalf of her owners, a stipulation for costs and a stipulation for value, and thereupon the schooner was released from custody and restored to the possession of her owners. The claimant, Bowker, filed his answer to the libel December 11, 1899, denying that the collision was caused or contributed to by those in charge of the schooner, alleging that the collision and the damage resulting therefrom were caused wholly by the fault of the steamer Azalea and of those in charge of her, in certain particulars stated, and concluding with the prayer that the libel be dismissed with costs.

December 29, 1899, Bowker, for and on behalf of himself and his co-owners, filed a cross-libel against the United States seeking to recover the sum of $6,000 damages alleged to have been sustained by the schooner and by her cargo in said collision. It was alleged in the cross-libel that the collision was wholly due to the negligence and fault of the steamer Azalea and of those in charge of her, the particulars being set forth, and the prayer of the cross-libel asked "that a citation, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, may issue to the said respondents above named, citing and admonishing them to appear and answer all and singular the matters aforesaid, and that this honorable court shall pronounce for the damages, with interest and costs, and will grant a stay of all further proceedings in the action of the said respondent brought by it in this honorable court against the schooner William H. Davenport by the filing of a libel against said schooner, on November 3, 1899, until security be given by said respondent, pursuant to the admiralty rules of the Supreme Court of the United States and the practice of this honorable court, to respond for the damages claimed in this cross-libel, and that this honorable court will give to the cross-libellants such other and further relief as in law and justice he may be entitled to receive, this said action being a counterclaim arising from the same cause of action for which the original libel was filed against the said William H. Davenport."

Citation was issued and served on the United States attorney for the district, who was the proctor of record for the libellant in the original suit. The United States attorney filed a notice of motion to quash the citation, February 14, 1900, and a motion to that effect was argued by counsel. December 17, 1900, the District Court filed its written decision, holding that the cross-libel could not be maintained because the court had no jurisdiction to entertain the cause or to enter a decree as prayed for against the United States, whereupon and on that day the court entered a decree that the citation be quashed and that the cross-libel be dismissed with costs. 105 Fed. Rep. 398. The cross-libellant thereupon appealed to this court and the appeal was allowed on the question of jurisdiction. The District Court made a statement of the facts, to which a copy of the record was attached, and certified five questions in respect of jurisdiction under the cross-libel to this court for decision.

Mr. Chief Justice FULLER delivered the opinion of the Court:

This appeal is prosecuted under the fifth section of the judiciary act of March 3, 1891, providing "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: (1) In any case in which the juris-

diction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

By the sixth section the Circuit Court of Appeals, in cases within its appellate jurisdiction, may certify to the Supreme Court "any questions or propositions of law concerning which it desires the instruction of that court for its proper decision," and our thirty-seventh rule requires in such cases that "the certificate shall contain a proper statement of the facts on which such question or proposition of law arises."

The District Court has observed that rule in form, but it is under the fifth section that our jurisdiction is invoked, and, as the record accompanies the statement, we are enabled to dispose of the appeal.

It was settled, soon after the passage of the act of 1891, that cases in which the jurisdiction of the District or Circuit Courts was in issue could be brought to this court only after final judgment. *McLish* v. *Roff*, 141 U. S. 661; *Railway Company* v. *Roberts*, Id. 690. The subject was carefully considered in the opinion of Mr. Justice Lamar in the first of these cases, and the conclusion reached was in accordance with the general rule that a case cannot be brought to this court in parcels. *Railway Company* v. *Postal Telegraph Company*, 179 U. S. 641.

The preliminary question is, therefore, whether the decree dismissing this cross-libel is a final judgment within the rule upon that subject. It was long ago held that a decree dismissing a cross-bill in equity could not be considered, standing alone, as a final decree in the suit, and was not the subject of an independent appeal to this court under the judiciary act of 1789; and that it could only be reviewed on an appeal from a final decree disposing of the whole case. *Ayres* v. *Carver*, 17 How. 591; *Ex parte Railroad Company*, 95 U. S. 221.

It is argued that *Ayres* v. *Carver* is distinguishable from the case at bar because the twenty-second section of the judiciary act of 1789, under which the appeal in that case was taken, provided in terms for the revision of final decrees, whereas no specific mention is made of final decrees or judgments in section five of the judiciary act of 1891. But that difference was specifically disposed of in *McLish* v. *Roff*, as not affecting the principle that the decree must be final in order to be appealable.

Counsel quote the language of Mr. Chief Justice Waite in *Railroad Company* v. *Express Company*, 108 U. S. 28, that "a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined;" and insist that the decree on the cross-libel has definitively determined the right of respondent to affirmative relief. But the litigation between the parties

on the merits embraced the right of libellant to recover because of the fault of respondent, as well as the right of respondent to recover because of the fault of libellant, and until the question as to which of the parties was at fault, or whether both were, is determined, that litigation cannot be said to have terminated. If the District Court had held that it had jurisdiction to award affirmative relief against the United States on the cross-libel, the cause would have stood for hearing on the whole case. Its decision that it did not have jurisdiction simply prevented respondent from obtaining affirmative relief over, assuming that the facts justified it. And however convenient it might be that the question of jurisdiction of the cross-libel should be adjudicated in advance, it is nevertheless true that when a decree was rendered on the original libel, the error, if any, committed in dismissing the cross-libel, could be rectified. That this course might result in delay, and perhaps sometimes in hardship, if it should turn out that jurisdiction could be exercised on the cross-libel, is not a sufficient reason for entertaining an appeal, if the decree did not so dispose of the case as to enable this court to take jurisdiction.

Generally speaking, the same principles apply to cross-libels as to cross-bills, and this case affords no ground of exception therefrom.

In admiralty, if the respondent desires to obtain entire damages against the libellant, or damages in excess of those claimed by libellant, a cross-libel is necessary, although matters of recoupment or counterclaim might be asserted in the answer. *The Sapphire*, 18 Wall. 51; *The Dove*, 91 U. S. 381.

In *The Dove* a final decree was entered in favor of the libellants in the original suit, and a decree rendered at the same time dismissing the cross-libel. No appeal was taken from the decree of dismissal, but the case was carried to the Circuit Court from the District Court by appeal from the decree on the libel, which was affirmed, and the cause brought to this court.

The principal question involved on the appeal to this court was whether the submission to the dismissal of the cross-libel in the District Court by the parties who had filed it, prevented them from making the same defense to the original libel that they might have made if no cross-libel had been filed, and it was held that while the parties were bound by the decree of the District Court dismissing the cross-libel, the issues of law and fact involved in the original suit were not thereby disposed of.

In the course of some general observations, Mr. Justice Clifford, delivering the opinion, after remarking that causes of that kind might be heard separately, said: "Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross-suit adverse to the libellant, even if the decree is entered before the original suit is heard, will not impair the right of the

respondent in the original suit to avail himself of every legal and just defense to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit. . . . Whether the controversy pending is a suit in equity or in admiralty, a cross-bill or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit, or against other defendants in the original suit or against both, touching the matters in question in the original bill or libel. It is brought in the admiralty to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross-bill is sometimes used to obtain a discovery of facts. New and distinct matters, not included in the original bill or libel, should not be embraced in the cross-suit as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross-suit is, in general, incidental to, and dependent upon, the original suit. *Ayres* v. *Carver*, 17 How. 595; *Field* v. *Schieffelin*, 7 Johns. Ch. 252; *Shields* v. *Barrow*, 17 How. 145."

In this case the cross-libel was, as stated therein, "a cross-libel brought under admiralty rule 53 of the Supreme Court of the United States, being a counterclaim arising out of the same cause of action as the suit brought by the United States against the said schooner William H. Davenport in a cause of collision, by a libel filed November 3, 1899, in said court." The 53d admiralty rule provides that the respondents in a cross-libel shall give security to respond in damages, unless otherwise directed, and that all proceedings on the original libel shall be stayed until such security shall be given.

The cross-libel and the answer to the libel were consistent, the subject-matter of the libel and the cross-libel was the same, and the latter, in no proper sense, introduced new and distinct matters. The cross-libel occupied the same position as a cross-bill in equity, and the general rule is that the original bill and the cross-bill should be heard together and disposed of by one decree, although, where the cross-bill asks affirmative relief, and is therefore not a pure cross-bill, the dismissal of the original bill may not dispose of the cross-bill, which may be retained for a complete determination of the cause. *Holgate* v. *Eaton*, 116 U. S. 33, illustrates this. There the bill and cross-bill were heard together, and it was held that the original bill must be dismissed, but that relief might be accorded on the cross-bill. The cross-bill was not filed merely as a means of defense, but of obtaining affirmative relief, and the defeat of the bill sustained the disposition of the cause on the cross-bill. Such might be the result here if it turned out on

the hearing that the Azalea was in fault and not the schooner, provided jurisdiction could be maintained to award relief against the United States. But in any point of view, the decree on the cross-libel did not so finally dispose of the whole case as to entitle us to take jurisdiction under section 5 of the act of 1891.

Appeal dismissed.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.